No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH E. SEAGRAM AND SONS, INC., THE HOUSE OF SEAGRAM, INC., McKESSON AND ROBBINS INCORPORATED, BARTON DISTILLING COMPANY and BARTON WESTERN DISTILLING CO., *Appellants,* vs. HAWAIIAN OKE AND LIQUORS, LTD., *Appellee.*	USDC HAWAII ~~No. 2418~~

Upon Appeal from the United States District Court for the District of Hawaii

OPENING JOINT BRIEF ON BEHALF OF APPELLANTS and APPENDIX

FILED

FEB 16 1968

WM. B. LUCK, CLERK

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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FEB 23 1968

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JURISDICTION

The jurisdiction of the District Court was based upon 28 USC §1337 and 15 USC §15. The jurisdiction of this Court rests on 28 USC §1291. The jury returned a verdict for plaintiff on April 25, 1967 (R. 295) and judgment was entered on June 2, 1967 (R. 307).

NOTE: References in this brief to "Seagram" will be to The House of Seagram, Inc. or to Joseph E. Seagram & Sons, Inc., or both as the context indicates; to "Barton" will be to Barton Distilling Company and Barton Western Distilling Co.; to "McKesson" will be to McKesson and Robbins, Incorporated; to "defendants" to all appellants and to "Hawaiian Oke" or "plaintiff" to Hawaiian Oke and Liquors, Ltd.

Notice of appeal was filed by McKesson on June 8, 1967 (R. 304), by Joseph E. Seagram & Sons, Inc. and The House of Seagram, Inc. on June 13, 1967 (R. 310) and by Barton on June 27, 1967 (R. 311). The time for docketing the record on appeal was extended by the District Court to September 6, 1967 (R. 348) and by this Court to November 6, 1967. The record was filed in this Court on October 31, 1967.

STATEMENT OF THE CASE

This is a treble damage action for an alleged violation of the Sherman Act.

Until 1965, plaintiff was a liquor distributor in Hawaii of products supplied by Seagram, Barton and others. In June and July 1965, Seagram and Barton each decided to substitute McKesson as their distributor and notified plaintiff.

On July 30, 1965, at a meeting attended by counsel, plaintiff's stockholders decided to institute this action against Seagram, Barton and McKesson for alleged conspiracy "to put the company out of business" in violation of the Sherman Act. (Ex. B-7.) Thereafter, plaintiff discontinued operations and liquidated its business.

The Parties

Joseph E. Seagram & Sons, Inc. is a manufacturer of alcoholic beverages. The House of Seagram, Inc., a wholly owned subsidiary, is the national distributor for these products. It conducts its marketing through

unincorporated sales divisions. Three divisions (Calvert, Four Roses and Frankfort) had one-year distributorship contracts with plaintiff that expired by their terms on July 31, 1965. (Tr. II: 453; Exs. S-10, S-11, S-12.)[1]

McKesson is a national wholesale distributor of drugs and liquors. Barton Distilling Company is a national manufacturer and supplier of alcoholic beverages, and Barton Western Distilling Co. is its wholly owned subsidiary. (Tr. II: 759.) Plaintiff had no contract with Barton; their oral arrangement was terminable upon reasonable notice by either party. (Tr. II: 503, 571.)

Background

In Hawaii, suppliers of alcoholic beverages have usually distributed to retailers through an exclusive wholesale representative, although dual distribution is used in a few instances. (Tr. IV: 1544-1546; VI: 2367-2368.)

In June 1965, plaintiff was the distributor for all Calvert and Four Roses products, all but one of the Barton products, and two of the three Frankfort products. (Tr. I: 145-46; II: 771; VI: 2330-31.) One Barton product and one Frankfort product were distributed by McKesson. (Tr. I: 163-64; VI: 2324.)

Changes of distributors are common in Hawaii. (Tr. II: 448, 504; Ex. S-18.) From 1952 to 1965, the Calvert distributorship was changed four times (Ex.

[1]Roman numerals refer to the volumes and arabic numbers, the pages in the transcript.

S-18), and in the six years prior to 1965, the Barton distributorship had been changed twice (Tr. II: 504).

The 1965 Change of Distributors

For two years, Calvert officials were dissatisfied with plaintiff's sales and distribution. (Tr. II: 457-458; V: 2133.)[2] Plaintiff admitted the complaints (Ibid.) and that its distribution was poor, particularly on the outer islands. (Tr. II: 457-458; 616-618; V: 2135.)

McKesson was a satisfactory Calvert distributor on the mainland. (Tr. IV: 1439.) In May 1965, Arthur Murphy (head of Calvert) proposed to Joseph Cotler (vice president of McKesson) that McKesson distribute Calvert products in Hawaii. (Tr. IV: 1439-1440; VII: 2639.) McKesson, however, was the distributor of products of another House of Seagram division. (Tr. VII: 2639.) One of those products, Seagram 7 Crown, was the leading blended whiskey in Hawaii. (Tr. V: 2178-79.) Fearing that Calvert products would not receive adequate attention from the salesmen who sold 7 Crown, Murphy asked that McKesson form a separate sales force to handle Calvert lines. (Tr. IV: 1440-41; VII: 2639.)

Cotler expressed interest and arranged a meeting with his West Coast representatives, James Maloney and Abe Kauhane of Hawaii, upon their return from

[2]Fleischman of Calvert was unable to get Calvert at Wo Fat's, a restaurant owned by the Wongs, who also controlled and managed Hawaiian Oke (Tr. VI: 2531-2532). For convenience the names of the representatives of the parties who will be referred to are listed in Seagram's Ex. S-17 which is reproduced in the Appendix, p. i.

Europe. (Tr. II: 339; IV: 1440; VII: 2639.) On June 3, 1965, Cotler, Maloney and Kauhane met with Murphy and Fleischman of Calvert and Yogman (of Joseph E. Seagram & Sons, Inc.), (Tr. II: 339-342.)

The McKesson people viewed the proposal favorably but wanted to find out if they could get other brands for distribution by the new sales force, since Calvert alone would not justify the move. (Tr. II: 348-356.)

Cotler consulted officials of various suppliers seeking additional brands. Maloney returned to California about June 7, 1965 and telephoned Sheldon Friedman of Barton. Barton had not been aware of the New York meeting. (Tr. II: 396-397, VII: 2640-2641.)

McKesson was the Barton distributor in San Francisco. In mid-June 1965, Friedman and his superior, Sydney Weinstock, were on the West Coast (Tr. VI: 2279.) On June 14 or 15, they met with Maloney who solicited Barton for the proposed McKesson (Portside) house. (Tr. VI: 2279-80; Ex. P-18.) Weinstock expressed interest and told Maloney that he and Friedman would look into the matter in Hawaii in July. (Tr. VI: 2280-81.) Neither had been there before. (Tr. II: 830.)

Barton had been dissatisfied with plaintiff's chronic delinquency in paying its bills since 1962, and in October 1963 had decided to "make a jobber change". It was apprehensive about plaintiff's large balances owed, operational losses and huge deficits. (Exs. B-22, B-23, B-24, B-25, B-28, B-29, B-33, B-34, B-35, B-37, B-38, B-42, B-48, B-84, B-86, B-87, B-99, M-41, M-44; Tr. II: 825-829, 832-833; III: 849, 852, 911; IV: 1327-

1334, 1336-1337, 1366-1367, 1411-1414, 1420; VI: 2309, 2312.) Also Barton had long been dissatisfied with plaintiff's poor "products mix"; i.e., the high proportion of sales of unprofitable "white goods" (e.g., vodka and gin) over "brown goods" or "branded goods" (e.g., bourbon and scotch). (Exs. B-52, B-63, B-77; Tr. III: 849-851, 926-927; IV: 1372; VI: 2277-2278.)

However, Barton had been unable to find a substitute until McKesson's "second house" was proposed. (Tr. II: 764-765; III: 893; IV: 1337-1340, 1403-1404.)

On or about June 15, 1965, Maloney and Cotler conferred by telephone and decided to proceed with the new house, which eventually was Portside Distributors. (Tr. II: 358-359.) Cotler informed Murphy of the decision. (Tr. II: 357-358.)

On June 25, 1965, Calvert notified plaintiff that it would not renew its contract. (Tr. I: 146-47; II: 461; III: 1282.) On June 28, 1965, the Four Roses division gave plaintiff a similar notice. (Tr. I: 150; II: 463.) (Prior to learning of the Portside proposal, a Four Roses official had sent plaintiff a contract which was signed by plaintiff but never executed by Seagram. (Tr. IV: 1443-45).) On July 2, 1965, the Frankfort division also notified plaintiff that it would not renew its contract. (Tr. II: 464.)

On July 5, 1965, Friedman (of Barton) came to Hawaii. (Tr. II: 788.) The next day he visited plaintiff's warehouse and discussed business. (Tr. II: 789.) Plaintiff informed him of the Seagram change (Ibid.) That afternoon he visited Kauhane at Mc-

Kesson's office and was impressed with the facilities and operations there as compared with plaintiff's. (Tr. III: 848-849.) The following day Friedman called Weinstock. (Tr. II: 793.) They discussed the pros and cons of moving to McKesson, including the probable effect of the changes by Seagram on plaintiff's performance as distributor of Barton, and decided that it would be in Barton's interest to move to Portside. (Tr. II: 793, 796-797; III: 839.) That afternoon, Friedman notified plaintiff and McKesson of the decision, effective August 31, 1965. (Tr. II: 793-794.)

At no time was there any agreement or even any communication between any representative of Seagram and Barton. Plaintiff conceded that there would be no such evidence. (Tr. I: 22.) Nor was there any evidence that Seagram conditioned its dealings with McKesson on McKesson's obtaining Barton's business.

Plaintiff's History and Outlook

Plaintiff is a corporation managed and controlled by the Wong family. (Tr. II: 527, 530-32; VII: 2613-18.) While it was run by the father, Henry Wong, it prospered, but after World War II, it went downhill. In 1961 Henry Wong wrote his son Ted in Tokyo describing the plight of the business and urged him to return to take over. (Tr. I: 140-141.) Ted did and found the business "in a complete mess". (Tr. I: 141.) Henry Wong then fired his son David (who spent too much time on the golf course) and placed Ted in charge. (Tr. VII: 2616.)

Plaintiff experienced consistent losses in operations from $45,589 in 1959 to $18,767 in 1964 and $5,779 for the first six months of 1965, just prior to the change. (Exs. P-1, S-5.) Plaintiff showed small net profits in 1962-1964 and the first six months of 1965 when certain nonoperating income was included. However, this included rent from a leasehold that had been transferred from the corporation in 1963 to Thelma Wong (Henry's wife). Tr. I: 259-61; VII: 2607; Exs. B-14, B-14B, B-14C.)

Following the change, plaintiff made no real effort to obtain other lines. It approached no supplier to secure replacements. Its only attempts were telephone calls to two friends, liquor distributors in California. (Tr. I: 289-98.) Although the stockholders had directed management to try to sell the business, no steps were taken other than a meeting with a prospect "in the men's room" and supplying him with some financial statements. (Tr. I: 273-276, Ex. B-7.) After he saw the financial statements, the prospective purchaser was not interested. (Tr. I: 277.)

Plaintiff ceased selling to the public on October 1, 1965. (Tr. II: 574.) The corporation was not formally dissolved. (Tr. I: 222-223.) Its remaining lines, including Old Mr. Boston were turned over to Sam Wong, its sales manager who became associated with another company. (Tr. I: 303; IV: 1555; V: 2125.)

Proceedings Below

The court denied defendants' motion for directed verdict (R. 279-282) despite the failure of proof of

any agreement between Seagram and Barton, the absence of any evidence of an unreasonable restraint of trade and the absence of any competent evidence of damage. (Tr. IV: 1677; VIII: 3177, 3178.)

The court made the novel ruling that the unincorporated sales divisions of Seagram were entities (for purposes of the Sherman Act) and could conspire among themselves. (Tr. VII: 2762-2777.)[3]

The jury returned a verdict against all defendants of $65,000. (R. 295.) Defendants' motions for judgment n.o.v. or a new trial (R. 300-302) were denied. (R. 305.) Final judgment, together with interest, costs and attorneys' fees in the sum of $246,938.34 was entered. (R. 307.)

QUESTIONS PRESENTED

1. Was there sufficient evidence of either an unreasonable restraint of trade or a per se violation of the Sherman Act to support the verdict? (Error No. 1, App., p. ii.)

2. Did the court err in the admission or rejection of evidence on the issue of conspiracy in the following particulars?:

(a) Admitting the irrelevant hearsay testimony of Ted Wong as to Friedman's "guesses" on the reasons for the change (Error No. 2, App., p. ii);

---

[3]Barton and Barton Western were regarded as one entity for the purposes of this suit (Tr. VIII: 3204).

(b) Admitting evidence of McKesson's performance after the change (Error No. 3, App., p. v.)

3. Did the court err in instructions on the issue of conspiracy as follows?:

(a) That an agreement or participation in a plan to establish Portside knowing that the result would be non-dealing with plaintiff constituted a per se violation (Error No. 5, App., p. ix);

(b) That the unincorporated divisions of Seagram were legally capable of conspiring among themselves (Error No. 6, App., p. xiii);

(c) That it was unlawful for Joseph E. Seagram & Sons, Inc. to instruct the unincorporated divisions of its subsidiary, The House of Seagram, Inc. to change distributors (Error No. 7, App., p. xv);

(d) That parallel behavior alone was sufficient to establish a conspiracy and refusing to instruct that such behavior does not prove a conspiracy unless the surrounding circumstances logically suggest joint agreement (Error No. 8, App., p. xvii.)

4. Did the Court err in the admission or rejection of evidence on the issue of damages?:

(a) Admitting profit projections and charts and permitting them to be explained by an accountant while at the same time refusing to allow cross-examination on the relevance of the charts (Error No. 9, App., p. xviii);

(b) Admitting evidence of casual expressions of interest by third parties in acquiring plaintiff's business (Error No. 10, App., p. xxiii);

(c) Admitting evidence of alleged out-of-pocket losses. (Error No. 11, App., p. xxiv.)

5. Did the Court err in giving and refusing instructions on damages? (Error No. 12, App., p. xxiv.)

SPECIFICATION OF ERRORS RELIED ON

The errors relied on are extensive and set out in the Appendix to this brief, pp. ii to xxxi, as approved by order of this Court, January 2, 1968.

SUMMARY OF ARGUMENT

The judgment should be reversed with direction to dismiss the complaint, since there was no evidence of an unreasonable restraint of trade or a per se violation of the antitrust laws. No question of price fixing is involved; all distributors must sell at the price listed with the Hawaii Liquor Commission. No question of monopoly is involved; it was charged but abandoned. There is no evidence that the changes of distributorships were made because of any unlawful or improper motive.

The court erred in admitting hearsay and speculative testimony of a "deal" among defendants and exhibits comparing Portside's performance after the change with Hawaiian Oke's before.

The court erred in charging the jury that it could find a per se violation under the circumstances shown; it permitted the jury to find a conspiracy among the unincorporated Seagram divisions alone to infer an agreement between Seagram and Barton on nothing more than parallel behavior.

The court erred in admitting evidence on damages consisting of exhibits representing the argument of counsel dressed up to look like expert testimony and testimony of casual expressions of interest by third persons in purchasing plaintiff's business.

The court erred in charging the jury on future profits, abstract expressions of interest in purchasing the business, out-of-pocket losses, and exhibits representing counsel's argument that were treated as expert testimony. It refused to instruct the jury not to consider rental income from the leasehold which had been transferred from plaintiff in 1963.

ARGUMENT

I. THE COURT ERRED IN RULING THERE WAS SUFFICIENT EVIDENCE OF A CONSPIRACY TO SUSTAIN A VERDICT

Plaintiff made no attempt to prove an unreasonable restraint. It chose to stand or fall on an alleged per se violation of the Sherman Act, labelling defendant's actions a "group boycott."[4]

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[4]As a learned judge has pointed out "the tyranny of tags and tickets" is no substitute for analysis. Cardozo, *Mr. Justice Holmes,* 44 Harv. L. Rev. 682, 688 (1931).

Plaintiff conceded the right of a supplier to change distributors unilaterally. *Ace Beer Distributors v. Kohn, Inc.,* 318 F.2d 283 (6th Cir. 1964), cert. denied 375 U.S. 922; *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 362 F.2d 1008 (9th Cir. 1966), cert. denied 385 U.S. 976. It contended, however, that the three Seagram divisions and Barton had mutually agreed to use McKesson as their joint exclusive distributor and that this was a group boycott. The evidence did not establish a group boycott.

A. Plaintiff Failed to Prove Any Horizontal Agreement

Plaintiff's case must fail for lack of proof of any horizontal agreement. The Seagram divisions are not independent competitors and are not capable of conspiring among themselves, and there was no proof of any agreement between Seagram and Barton.

1. Unincorporated divisions of a single corporation cannot conspire among themselves

Unlike Section 2 of the Sherman Act, which forbids monopolization as well as conspiracies to monopolize, Section 1 does not prohibit unilateral restraints of trade; it proscribes only contracts, combinations and conspiracies, all of which require a plurality of actors.

When a corporation monopolizes an industry, the directors who authorize and participate in the corporate action may be in violation of Section 2. See, e.g., *Patterson v. United States,* 222 Fed. 599, 618 (6th Cir. 1915), cert. denied 238 U.S. 635 (1915). There is nothing unusual about holding directors liable for causing the corporation to commit an act that is un-

lawful when done by the corporation alone. However, it is contrary to logic and furthers no policy of the antitrust laws to hold that agents of one corporation can be guilty of conspiring among themselves to cause the corporation to act as it may lawfully do itself.

If a corporation may set its prices, it cannot be a a price fixing conspiracy for its officers to agree on the price. Under the ruling below, if the officers of Seagram divisions discuss prices, that would be a violation. If a corporation may choose its distributors, it cannot be a group boycott for its officers to agree to use one rather than another. If the plurality of actors demanded by Section 1 is satisfied by the acts of the officers of a single corporation, then virtually every corporate action would be a Section 1 violation. No decision could be made by intra-corporate consultation.

The courts have consistently held that the directors, officers, employees and agents of a single corporation cannot commit a Section 1 violation by agreements among themselves.

Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), cert. denied 345 U.S. 925 (1953);

Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960);

Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599 (D.C. Cir. 1960), rev'd on other grounds 368 U.S. 464 (1962);

Deterjet Corporation v. United Aircraft Corp., 211 F.Supp. 348 (D. Del. 1962);

Kemwel Automotive Corp. v. Ford Motor Co., 1966 Trade Cases ¶17,882 (S.D. N.Y. 1966);
Johnny Maddox Motor Co. v. Ford Motor Co., 202 F.Supp. 103 (W.D. Tex. 1960);
Reines Distributors, Inc. v. Admiral Corp., 256 F.Supp. 581 (S.D. N.Y. 1966).

As stated in *Nelson Radio, supra:*

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. (p. 914.)

The unincorporated divisions of Seagram are not legal entities. They have no more independent existence than the clothing department and the furniture department of a retail store. They are nothing more than abstractions representing the internal structuring of The House of Seagram, Inc. They are simply groupings of Seagram employees charged with marketing Seagram products.

The divisions have no stockholders, no directors, no bank account, no assets and no liabilities. Their officers and employees are paid by Seagram. (Tr. VII: 2638.) Seagram determines the form and content of the distributor contracts. (Exs. S-10, 11, 12.) It freely shifts its employees from one division to another. (Tr. VI: 2505-2513; VII: 2621-2622.)[5]

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[5]Fleischman who in 1965 was a Calvert officer, at the end of the trial headed Frankfort. (Tr. VI: 2512.)

The divisions can neither sue nor be sued.[6] A finding that the divisions conspired is in reality no more than a finding that Messrs. Murphy, Wishny, Flint and their subordinates—all employees of Seagram—conspired to determine which distributor they thought would best serve the interests of Seagram.

The novel doctrine enunciated by the lower court applies with equal force to individual proprietorships. If A owns a bakery and puts B in charge of selling cakes, C in charge of cookies and D in charge of bread, any consultation and agreement among B, C and D as to the most efficient way to market A's products becomes a conspiracy. We cannot conceive that such a result was intended.

In *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594 (1953), the Supreme Court commenting on the inapplicability of a conspiracy charge against one publishing company that operated two competing newspapers, said:

> In our view, no additional circumstances bring this case within §1. Though operating two constituent newspapers, the Times-Picayune is a single corporation, and the Government in the District Court abandoned a charge of unlawful concert among the corporate officers. (p. 626.)

Here, the court below stated:

> Normally such decisions are made "entirely independently" of any other division. If these au-

[6]The court below instructed the jury that if it found against any one or more of the divisions, the verdict was to be returned against Seagram.

> tonomous divisions deviated from their normal procedure, so that separate, decision-making "heads" acted in concert, they became subject to the proscriptions of the antitrust laws. (R. 328-329.)

Thus the court elevated deviations by corporate employees from "normal procedure" in their relations with one another to the level of a Section 1 violation.

The court did not even find a violation of corporate policy—only "normal procedure." It quoted the testimony of Seagram officials to the effect that each division customarily makes its own decisions in matters of marketing (R. 325-328), but omitted the testimony that the division heads of Seagram were free to discuss their respective distributorships, as was made clear by Edgar Bronfman, president of Joseph E. Seagram & Sons, Inc.:

> Q. Apart from whether they changed or not, do you know whether the company has any policy on the subject of whether or not the heads of the companies (i.e., divisions) may confer with each other on the subject of pricing?
>
> Mr. Bronfman: Yes, they may.
>
> Q. Are they free to confer with each other on the subject of who their respective distributors in a given area will be?
>
> Mr. Bronfman: If you are restricting this question to the House of Seagram companies, the answer is yes. (Tr. III: 964.)[7]

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[7]The post verdict opinion of the court filed July 24, 1967 omits this testimony and substitutes three asterisks. (R. 325.)

In spite of this testimony, the court took it upon itself to rule that any consultation and agreement violated "normal procedure" and subjected Seagram to liability. No policy of the antitrust laws requires undeviating adherence to a practice of intracorporate competition even when the corporation's officers determine otherwise. The ruling was not only erroneous but also inappropriate (since the court was not sitting as trier of fact).

Had Seagram concealed the fact that its sales companies were no more than divisions of a single company, so that outsiders were misled, a tenuous claim of estoppel might be urged. But there was no deception here. Each of the three contracts with plaintiff and the divisions is identical except for the name of the division. (Exs. S-10, 11, 12.) Each was identified as divisions of Seagram. All billing to plaintiff was by and in the name of Seagram and all payments were made to Seagram. (Tr. V: 1834; VII: 2642; Ex. M-41.) Plaintiffs clearly knew that it was dealing with three divisions of one entity, not three separate and independent businesses.

The lower court stressed the fact that the divisions had previously been wholly owned subsidiaries of Joseph E. Seagram & Sons, Inc. and that in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., et al.*, 340 U.S. 211 (1951), it was held that the subsidiaries were capable of conspiring among themselves. It stated:

> There is nothing wrong with reorganizing to comply with court rulings. However, to avoid the

> judicial proscription, the reorganization must be more than a shuffling of papers. . . . Private parties cannot evade the applicable law merely by changing the label attached to a particular business entity. (R. 324, 325.)

There is nothing in the record to sustain the court's characterization of Seagram's reorganization as a "shuffling of papers" or a mere change of "label." The consolidation entailed substantial changes in the corporate structure and resulted in the sacrifice of certain advantages by Seagram. Formerly each subsidiary was a self-contained unit. Each had its own assets and its own payroll. Each had its own accounting department and each did its own billing. Each had limited liability. After the consolidation, anyone (including plaintiff) with a cause of action against any division could look to the entire assets of The House of Seagram, Inc. Moreover, consolidation resulted in the loss to Seagram of all the tax advantages available to multiple corporations. See, e.g. IRC §§11(c), 531. It was no sham transaction.

The law provides alternative methods of doing business, each having advantages and disadvantages. If Seagram decided that the result reached in *Kiefer-Stewart* was an unrealistic reflection of the substance of its operations, it was entitled to reorganize its corporate structure. The court's gratuitous conclusion that the reorganization was a mere "shuffling of papers" was wholly unwarranted from the record even had the court been the trier of fact. The court expressed concern that a contrary conclusion would

open the door to avoidance of the impact of the Sherman Act. It stated:

> To hold otherwise would give businessmen the power to avoid the proscriptions of the antitrust laws by the fortuitous employment of alert legal counsel. (R. 322.)

This represents a back-door approach to enforcement of antitrust policy. If a single corporation possesses undue power, Section 2 provides the remedy. If the corporation is not in violation of Section 2, it should be free to have its business handled by different groups of employees without fear of running afoul of Section 1. Indeed, there is no validity to a doctrine that can be easily circumvented by having all the corporation's products handled by the same salesmen. The result would simply burden the corporation with a less efficient distribution with no benefit to the public.

The decision below is contrary to precedent, flies in the face of settled concepts of corporate law and the law of conspiracy, and serves no useful economic purpose. It furthers no policy of the antitrust laws and should be flatly repudiated.

2. There was no evidence of an agreement between Seagram and Barton

Since the three Seagram divisions are legally incapable of committing a Section 1 violation, proof of an agreement between Seagram and Barton was necessary to sustain plaintiff's boycott allegation. *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 211,

n. 26 (9th Cir. 1957), cert. denied 356 U.S. 975 (1958); *Ace Beer Distributors, Inc. v. Kohn, Inc., supra.*

Plaintiff admitted there would be no proof of any express agreement between Seagram and Barton. (Tr. I: 22.) It argued instead that McKesson acted as an intermediary between them and that through McKesson they reached a tacit agreement to leave Hawaiian Oke and go with Portside. This argument is sheer speculation out of whole cloth. It is not supported by the evidence.

a. Conflicts in the Evidence

Although there were several evidentiary conflicts, nothing produced by plaintiff supports the inference of an agreement between Seagram and Barton.

Barton asserted that its decision to go with Portside was not made until after Friedman came to Hawaii in early July and examined the respective facilities of Hawaiian Oke and McKesson. Plaintiff, however, introduced evidence purporting to show that this decision was made earlier. (Exs. P-71, 72, 88.) This, if true, in no way establishes any link between Seagram and Barton.

Although Barton did not dispute that it knew of Seagram's decision before making its own, Seagram did not know of Barton's decision to go wth Portside until after all three of its divisions had made their commitments. Nonetheless, Ted Wong testified that Ed Kaufman of Four Roses telephoned him on June 28 and informed him not only that Four Roses was going

with Portside, but also that Barton had made a similar decision. (Tr. II: 467-469.)

If Wong's testimony is accepted as true, it establishes nothing more than mere knowledge by Seagram of Barton's decision or intended decision. It does not even establish conscious parallelism by Seagram. There is nothing to support an inference that this information was obtained before Four Roses had made its commitment to McKesson. In any event, it falls far short of establishing any agreement or mutual understanding between Seagram and Barton.

b. Conscious Parallelism in the Factual Context of This Case Is Insufficient Evidence of a Seagram-Barton Agreement

While conscious parallelism may be circumstantial evidence of a conspiracy, it does not of itself establish a Sherman Act violation. The Supreme Court has stated:

> (T)his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely. (*Theatre Enterprises, Inc. v. Paramount Film Distributing Co.*, 346 U.S. 537, 541 (1954).)

As the Third Circuit has pointed out,

> . . . (T)he probative value of (conscious parallelism) varies with the kind of parallelism and the factual setting where it is found. (*Delaware*

Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199, 203 (3d Cir. 1961), cert. denied 369 U.S. 839.)

Thus, sealed bids for 6,000 barrels of cement, for example, from eleven firms, identical to the fraction of a cent could hardly be coincidence. Cf., *FTC v. Cement Institute,* 333 U.S. 683 (1948). But a negative response by three cigarette companies to a request to do business with a new company setting up a ship chandlery operation was entitled to little weight, because the situation "was not of a sort which allowed much scope of action to the participants"; the only two possible answers to the request were "yes" or "no." *Delaware Valley Marine Supply Co. v. American Tobacco Co., supra* at 205.

The situation here is of the *Delaware Valley* rather than the *Cement Institute* type. Seagram and Barton were offered the opportunity to go with Portside. They could accept or refuse. They both accepted. More than this was needed to establish a conspiracy.

In *Delaware Valley,* the court ruled that there was evidence for the jury to find that each corporation was aware of the action taken by the others. It nonetheless affirmed a directed verdict on the ground that there was insufficient evidence from which a jury could rationally infer a conspiracy.

This Court reached the same result in *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656 (9th Cir. 1963), cert. denied 375 U.S. 922, in affirming a directed verdict, holding:

> The mere fact that two or more of the defendants dealt with the plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. . . . (p. 661.)

Here, no meeting was ever held between any representative of Seagram and Barton. There was no conversation, writing or even a telephone call between them. There was no conversation or communication between McKesson and either Seagram or Barton by which McKesson acted as a "go-between." Nor do the circumstances of their decisions to change rationally lead one to conclude that they must have agreed with each other beforehand. A conclusion that Seagram and Barton reached any agreement, express or tacit, is pure speculation. As this Court previously stated:

> Mere speculation must not be allowed to take the place of probative facts. (*Safeway Stores v. Fannan,* 308 F.2d 94, 97 (9th Cir. 1962).)

This rule was recently applied in directing a verdict for defendants in a case alleging a group boycott by manufacturers and retailers to prevent a discount house from obtaining appliances. *United Shoppers Exclusive v. Broadway-Hale Stores, Inc.,* 1966 Trade Cases ¶71,727 (D.C. Cal. 1965).

c. Inapplicability of the Interstate Circuit Doctrine

In the absence of proof of an agreement between Seagram and Barton, plaintiff relied on *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939).

There the court held that participation in a plan, knowing that if carried out it would result in a restraint of trade, was sufficient to establish an unlawful conspiracy if the restraint was unreasonable. (306 U.S. 226-227, 230-232.) In holding the restraint unreasonable, it condemned the plan as "harsh and arbitrary" (p. 230) and "the effect was a drastic suppression of competition and an oppressive price maintenance." (p. 231.)

Whether a given case constitutes conscious parallelism within the rationale of *Theatre Enterprises* or participation in a plan within the meaning of *Interstate Circuit* depends on the presence or absence of two factors. To fall within *Interstate Circuit* there must be (1) a plan whose success depends on the cooperation of all participants, or, in other words, the element of interdependence; and (2) knowledge of such interdependence by the participants or, as stated by some courts, "a consciousness of commitment."

Interstate Circuit, Inc. v. United States, supra at 226, 227;

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra at 540-541;

Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3d Cir. 1963);

United States v. Standard Oil Co., 316 F.2d 884, 890 (7th Cir. 1963).

Neither factor was present here.

First, there was no evidence that the success of the plan for establishing Portside depended on the par-

ticipation of Barton. The evidence was clear that Portside could not survive with Calvert alone and that it needed a Class B line. (Tr. II: 401.) Portside had acquired a Class B line, Kessler, when it acquired the Four Roses distributorship. (Tr. III: 1301; IV: 1527.) It also acquired a further Class B line, Mattingly & Moore, when it acquired the Frankfort distributorship. (Tr. IV: 1525; VI: 2323, 2325.) Nothing in the record supports the inference that McKesson needed Barton to make Portside viable.

Moreover, there were other potential lines, and McKesson had not exhausted those possibilities when Barton's decision was made. (Tr. II: 352, 401-402, 407-408; IV: 1544-1546; VI: 2437-2438.) Thus, even if the Seagram lines were not enough, nothing supports the conclusion that the move would have failed had Barton not participated. McKesson itself had other lines that it could shift to Portside if it chose. (Tr. II: 352, 401-402.)

Second, there is no evidence that either Seagram or Barton had any knowledge that the formation of Portside depended on their joint participation. Everyone knew that a distributor needs more than one line, but the record is barren of evidence that either Seagram or Barton had any reason to believe that the Barton line was essential or that other lines were not available.

There is no evidence of any commitment between Seagram and Barton not to deal with Hawaiian Oke. They were free either to establish a dual distributorship (Seagram did with Kessler earlier, Tr. IV: 1458,

1460) or to give any product back to Hawaiian Oke, or anyone else. All the Seagram contracts permitted it to appoint other distributors if it chose. (Exs. S-10, 11, 12; see para. 32.) There was no evidence that Seagram's arrangement with McKesson was any different. Barton had no contract with plaintiff. (Tr. II: 503, 571.) There was no evidence of any contract between Barton and McKesson.

In short, the necessary elements of the *Interstate Circuit* doctrine were not met. Lacking such proof, along with admitted absence of any agreement between Seagram and Barton, the complaint should have been dismissed.

B. An Agreement by Two or More Suppliers to Establish an Exclusive Distributor for Their Products Is Not a Group Boycott

Although there is no evidence to support it, we assume, *arguendo,* that an agreement was proved, and will demonstrate that such an agreement is not a per se violation or, to use the label, a "group boycott."[8]

1. The per se rule

The Sherman Act prohibits only those combinations or contracts constituting an unreasonable restraint of trade. *Standard Oil v. United States,* 221 U.S. 1 (1910). Certain types of agreements by their very nature constitute an unreasonable restraint and cannot be justified under any circumstances. *Id.,* at 58, 65.

[8]The Seagram divisions will be treated as one entity for present purposes.

The category of per se antitrust violations consists of:

> . . . agreements or practices which because of their *pernicious effect on competition* and *lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. (Emphasis supplied.) *Northern Pacific R. Co. v. United States,* 356 U.S. 1 (1958).

Among these are group boycotts, or concerted refusals to deal. *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 127 (1959); *United States v. General Motors Corp.,* 384 U.S. 127 (1966).

2. Characteristics of Group Boycotts

Broadly, a group boycott is a horizontal agreement (i.e., one between persons on the same level of competition) to refuse to deal with others. *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963). However, not every horizontal agreement that results in nondealing with others constitutes a group boycott. Only those possessing certain proscribed characteristics have been condemned. The Supreme Court described group boycotts as:

> . . . naked restraints of trade with no purpose except the stifling of competition. *(Ibid.)*

a. Discriminatory Boycotts

The majority of agreements struck down as group boycotts have been discriminatory in concept and operation. They single out a particular individual or class with whom the group will *not* deal, leaving the group free to deal with any others they choose. This

kind of agreement is the converse of an exclusive distributorship, which singles out a particular business with whom the group will deal, to the indiscriminate exclusion of all others. An agreement whereby competitors single out certain individuals or classes for non-dealing can have one of two purposes—to coerce others to comply with some policy of the group or to exclude others from the market.

Klor's and *General Motors* exemplify discriminatory boycotts used to exclude. In *Klor's,* a small retailer in competition with one of the defendants was singled out for non-dealing in an attempt to exclude him from the market. In *General Motors,* discount dealers as a class were singled out. There, exclusion was not the end in itself, but rather the means employed to maintain retail price levels.

Eastern States Lumber Association v. United States, 234 U.S. 600 (1914) exemplifies a boycott used to coerce. The purpose of the boycott was to compel compliance with the plan for horizontal division of the market. In *Binderup v. Pathe Exchange,* 263 U.S. 291 (1923), a discriminatory boycott was used to coerce adherence to an illegal tying agreement.

Discriminatory boycotts plainly fall within the rationale of the per se rule. Any combination of competitors formed to coerce or exclude others from the market is antithetical to competition. No business can have any legitimate competitive interest in who its competitor does not deal with.[9] Hence such agree-

[9]This does not apply to industry-wide regulation. This exception to the boycott rule is discussed below.

ments are condemned without regard to their economic consequences or the business reasons for adoption.

b. Indiscriminate Exclusionary Boycotts

Those agreements held to constitute boycotts that have not singled out a particular individual or class for non-dealing have been exclusionary in nature. That is, they seek to close the market to all but those within the favored group. *Radiant Burners, Inc. v. Peoples Gas Co.,* 364 U.S. 656 (1961) is an example. There a group of utilities refused to supply gas to any burners they had not approved, thereby excluding from the market any entrant who sought to compete with certain favored equipment manufacturers.

This type of boycott falls squarely within the rationale of the per se rule. It is nothing more than a device to achieve or maintain a horizontal division of the market, a practice long condemned under the antitrust laws. *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211 (1899).

3. Per se rule is inapplicable

The courts recognize that the per se rule does not apply to conduct resulting in non-dealing where there is a "justification derived from the policy of another statute or otherwise." *Silver v. New York Stock Exchange,* 373 U.S. 341, 348-49 (1963).

In *Deesen v. Professional Golfers' Association,* 358 F.2d 165 (9th Cir. 1966), cert. denied 385 U.S. 846, a professional golfer attacked as a boycott the refusal

of the PGA to permit him to participate in its tournaments. This Court found that the PGA requirements served a legitimate need and that since plaintiff did not meet those requirements, he had not been subjected to discrimination.

In *Cowen v. New York Stock Exchange,* 371 F.2d 661 (2d Cir. 1967), the court refused to apply the per se rule to disciplinary action against a stockbroker by the Stock Exchange.

In *Molinas v. National Basketball Association,* 190 F.Supp. 241 (S.D. N.Y. 1961), the court reviewed the rule whereby the owners of several professional basketball teams agreed to refuse to deal with players who bet on games. It found the rule reasonable and dismissed the complaint.

In *United States v. Insurance Board of Cleveland,* 144 F.Supp. 684 (N.D. Ohio 1956), 188 F.Supp. 949 (N.D. Ohio 1960), the government condemned a rule of a trade association excluding from membership any agent representing mutual, as opposed to stock, companies. The court refused to apply the per se rule. It recognized that *Klor's* and the other boycott cases concerned inherently anti-competitive plans where the refusal to deal was simply a naked restraint of trade with no redeeming virtue.

These cases make clear that the per se rule is not to be applied mechanically to strike down joint action that serves a legitimate purpose.

The cases cited above more nearly resemble group boycotts than does the "agreement" claimed here. In

each, identification of the class with which there were to be no dealings was critical. *Deesen* and *Molinas* involved total exclusion from the market. *Molinas* also involved coercion. None of this is present here.

Hawaiian Oke was not singled out for non-dealing. There was no more a refusal to deal with Hawaiian Oke than there was to deal with other distributors. Nor was there any evidence of an attempt to exclude it from the liquor market. There is no evidence that no other competing products were available as replacements. In fact, there were numerous lines being distributed in Hawaii (Tr. IV: 1544-1546; VI: 2367-2368), and plaintiff did not contact even a single supplier to secure replacements.[10]

Despite absence of discrimination, coercion or attempt to exclude it from the market, plaintiff maintained that there was nonetheless a "boycott" since there was an agreement between competitors which resulted in non-dealing with Hawaiian Oke.

If this is the law, the practical effect would be the stifling of legitimate joint ventures and other business projects requiring the pooling of resources. For example:

If A and B, theatrical producers, agree to pool their resources for a production that neither could finance alone and they agree to purchase costumes from C,

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[10]Ted Wong admitted that the only efforts to secure replacements were telephone calls to two friends in California. (Tr. I: 289-298.) One told him of the interest of one particular supplier, but plaintiff did not follow up. (Tr. I: 299-303.)

props from D and fixtures from E, this necessarily entails an agreement not to deal with F, G, H or any other possible supplier. Under plaintiff's theory this would be illegal per se.

The following would be similarly condemned:

A and B are liquor suppliers. Two large companies, C and D, are the only liquor distributors in City X. A deals with C, and B deals with D. Both A and B are dissatisfied. E, a newcomer trying to break into the market, informs several suppliers, including A and B, that he will set up a business with a commitment from two of them. A and B discuss E's potential and decide to give him their business. C and D continue in business despite the change of distributors by A and B.

Neither of these examples represents conduct so inconsistent with the competitive system and lacking in redeeming virtue as to be condemned out of hand as an unreasonable restraint, yet both involved horizontal agreements that result in non-dealing with others. The examples could be multiplied.

It is clear that an agreement between A and B to deal with D that results in non-dealing with C and the others does not suffer from the vices inherent in a simple agreement not to deal with C. Where there is no discrimination, no coercion, no attempt to exclude from the market, and no element of price fixing, illegal tying, or any similar arrangement, it is pointless to condemn such an agreement as illegal per se.

The agreement that plaintiff alleges here can serve a useful and legitimate purpose and is not a "naked

restraint of trade with no purpose except the stifling of competition" (Cf. *White Motor Co. v. United States, supra).* If the first distributor was dishonest or incompetent, the agreement would foster, not restrict, trade and thus benefit the public.

Plaintiff contended that the vice here was interdependence of Barton and Seagram. It claimed that the new Portside house could not have been formed without a mutual commitment from each and that McKesson would never have made the investment unless it knew the Portside house would be viable. (Tr. III: 871; VI: 2595, 2667-2669.) If this is so, it demonstrates the fallacy of plaintiff's position. While strenuously arguing that the new house could not have been formed without commitments by two or more suppliers, plaintiff contends that such commitments automatically constitute a violation. If this type of arrangement is so anticompetitive and devoid of merit that one does not even have to examine its effect on the market, then it applies with as much force to a small company trying to break into the market as it does to an established distributor like McKesson. Such an arrangement may in fact be the only practicable means available for a small company to enter the market.

The economics of the liquor industry are such that liquor distributors must have a "well-rounded" set of lines. They must supply their retailer customers with name brand, high-profit Class A lines and lesser-known, lower profit Class B lines; the addition of a "cheap"

Class C line is helpful. (Tr. II: 401-402, 671, 674; VII: 2667-2669.)[11] If a newcomer attempts to break into the market, he must be assured that he has enough lines to make it worthwhile. Similarly, before an established supplier can be expected to go with a new concern, it has a legitimate interest in the nature and scope of the operation and in the question of how its own line will fit into the total business of the distributor.

For the courts to abandon the rule of reason and apply the per se doctrine mechanically to all horizontal agreements resulting in non-dealing with others would inevitably freeze the liquor distributing industry in status quo. It would prevent the entry of competitors—a result directly contrary to the purposes of the antitrust laws. Cf. *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962); *United States v. Jerrold Electronics Corp.,* 187 F.Supp. 545, 560-568 (E.D. Pa. 1960), aff'd 365 U.S. 567 (1961).

The court below adopted a rule that would reduce the place of the independent by accelerating the trend toward vertical integration of distribution. If a supplier, dissatisfied with his existing distributor, knows he cannot participate in a plan to start another, he might abandon franchising altogether and simply integrate vertically.

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[11]Far from denying this, plaintiff took pains to emphasize that this was so. (Tr. VI: 2595; VII: 2667-2669.)

A rule that forbids businessmen from making a joint effort to extricate themselves from an unsatisfactory situation and leaves them with the choice of remaining where they are or integrating vertically makes little sense in terms of antitrust policy. The group boycott rule was never intended to apply to non-dealing situations that arose out of otherwise lawful projects requiring a joint effort or commitment.

Plaintiff relied solely on its per se theory and offered no evidence of an anti-competitive purpose or of the effect of the "agreement" on the relevant market. It failed to establish a per se violation, hence the complaint should have been dismissed.

II. THE COURT ERRED IN THE ADMISSION AND REJECTION OF EVIDENCE ON LIABILITY

A. Admission of Testimony As to the Purpose of Seagram's and Barton's Change of Distributors

Plaintiff attempted to prove that Seagram and Barton changed distributors for other than legitimate business reasons. However, the only "evidence" relating to any possible anti-competitive purpose was testimony by Ted Wong as to a conversation he had with Sheldon Friedman of Barton. Wong was asked if Friedman gave him any reason for the cancellation of the Barton distributorship, and testified:

> I asked him why this arrangement was being ended and he told me he didn't know; probably it would be a deal that McKesson would get Barton distribution in the West Coast . . . and in turn they would receive distribution here in Hawaii. And I asked him why would Seagram be involved. And he stated, well, maybe they have a deal some place, maybe in Europe. (Tr. 167-168.)

The court overruled defendants' objections of hearsay and speculation and admitted the testimony to show Friedman's state of mind. (Tr. 168-171, 558, 563.) It did so despite Wong's admission that Friedman's alleged statement had been a mere "guess" without any basis in fact. (Tr. 556-565.)

The fact that Friedman "guessed" that there might be a "deal" somewhere could not possibly aid the jury in reaching a logical conclusion as to Barton's reason for changing once Friedman stated that he did not know what the reason for the change was. The only possible relevance of Friedman's "guess" would be to prove that there was in fact such a "deal." But then his statement would be offered for its testimonial rather than circumstantial value. That would be inadmissible as hearsay.

Dantzler v. Dictograph Products, Inc., 309 F.2d 326, 329, 330 (4th Cir. 1962) cert. denied 372 U.S. 976;

Subin v. Goldsmith, 224 F.2d 753, (2d Cir. 1955) cert. denied 350 U.S. 883.

It would also be inadmissible as speculation. The rule is set forth in 7 *Wigmore on Evidence* (3d ed.) § 1917:

> The witness must speak as a knower, not merely a guesser. . . . (A) witness cannot be heard, so far as he means that he did not see the transaction in question but believes so on rumor alone or has otherwise reached by supposition his conclusion. (p. 2.)
>
> *Dantzler v. Dictograph Products, Inc., supra* at 329.

Accord:

Barnett v. Aetna Life Ins. Co., 139 F.2d 483 (3d Cir. 1943), cert. denied 321 U.S. 781 (1944);

Farris v. Interstate Circuit, Inc., 116 F.2d 409 (5th Cir. 1941);

Northern Trust Co. v. C.I.R., 116 F.2d 96 (7th Cir. 1940).

See also:

2 *Wigmore on Evidence* (3d ed.) §§ 650, 656, 658;

96 C.J.S. *Witnesses* § 52 (1957).

This testimony was the only evidence in the case suggesting any possible improper motive for the change of distributors. Its admission in flagrant disregard of elementary rules of evidence was highly prejudicial to all defendants and requires a reversal.

B. Evidence Comparing Plaintiff's Performance Before the Change With Portside Was Error

The court admitted over objection evidence comparing plaintiff's sales of Seagram and Barton products before the change of distributors with Portside's sales after the change. (Exs. P. 17A, P-17B, P-19, P-20, P-22, P-23, P-24, P-25, P-28, P-29, P-106, P-107, P-108, P-109, P-111, P-112, P-113, P-114, P-115; Tr. II: 813-815, 821-824; VI: 2405.) By showing that in certain instances plaintiff's sales exceeded Portside's, plaintiff attempted to prove that Seagram and Barton could not reasonably have been dissatisfied with plaintiff and that their decisions must have been based on factors other than legitimate business reasons.

Portside's sales performance was totally irrelevant. Such evidence could only serve to prejudice the jury. There was nothing to suggest that in June and July of 1965, either Barton or Seagram had the slightest reason to suspect that Portside would not do a good job. Plaintiff's evidence represented nothing more than an attempt to second-guess defendants. It was irrelevant and prejudicial.

> *Independent Iron Works, Inc. v. United States Steel Corp., supra;*
> *Standard Oil Co. of California v. Moore, supra;*
> *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,* 308 F.2d 383 (6th Cir. 1962), cert. denied 372 U.S. 907 (1963);
> *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957), cert. denied 355 U.S. 835 (1957).

After the court let this evidence in, it compounded the error by excluding evidence that Barton was dissatisfied with Portside after the change and had negotiated with another distributor, Spengler & Sons. A letter evidencing the negotiation, Exhibit B-67, was ruled inadmissible as cumulative. (Tr. III: 863-867.)

III. THE COURT ERRED IN GIVING AND REFUSING INSTRUCTIONS ON LIABILITY

A. Participation by Two or More Suppliers in a Plan to Establish an Exclusive Distributor Is Not a Group Boycott (Error No. 5, App., p. ix)

As shown above, an agreement between Seagram and Barton to use Portside would not be a per se violation, and the lack of proof of an unreasonable restraint requires reversal. Even if plaintiff had introduced evidence of an unreasonable restraint, a reversal would be required because the jury was not required to find any unreasonableness before finding liability.

The court charged the jury that if defendants participated in a plan to establish the new McKesson house knowing the result would be non-dealing with plaintiff, this was a per se violation.[12] Over objection (Tr. VIII: 3140-3151), it refused to distinguish between non-discriminatory non-dealing with plaintiff

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[12]The court's Instruction No. 6 is set forth in full in Error No. 5. It should be read together with the court's instructions on a "common plan". (Tr. VIII: 3203, 3212.)

that was simply a by-product of an exclusive dealership with McKesson and an actual agreement or plan to refuse to deal with Hawaiian Oke.

It charged that if McKesson "by solicitation of lines or otherwise" formed a "conspiracy" with Seagram and Barton "to terminate Hawaiian Oke . . . and to establish Portside," this was a per se violation of the antitrust laws by all defendants. (Tr. VIII: 3207-3208.) It stated that participation in a plan knowing the necessary consequence of which is to restrain trade (it did not say "unreasonably") was an "unlawful conspiracy" (Tr. 3212) and that a refusal to deal arising out of a "conspiracy" was an unreasonable restraint of trade (Tr. 3209). It told the jury that if there were such a plan, then the business reasons of the "conspiring parties" were not material. (Tr. VIII: 3208.)

These instructions were tantamount to a directed verdict for plaintiff. The jury did not have to find an intent to coerce others from dealing with Hawaiian Oke or exclude it from the market. Nor was it required to find that the purpose or effect of the plan to establish Portside was to single out Hawaiian Oke for discriminatory treatment. There was no need to find that the success of the plan was dependent on the participation of both Seagram and Barton. Nor was there any requirement of a finding of consciousness of commitment to a common plan between Seagram and Barton. (See Point 1A2c, *supra.*)

Under the court's instructions, the jury had to return a verdict for plaintiff even if it found that Sea-

gram had legitimate business reasons for requiring that Calvert not be handled by the same salesmen who sold Seagram 7 Crown, that the only way McKesson could arrange this was by setting up a separate house, that the only way it could hope to obtain other lines was to explain the nature of its proposed operation to the suppliers, and that Barton and Seagram made the change solely to improve the distribution of their products.

These facts do not per se constitute an unreasonable restraint of trade. If McKesson was prohibited from advising the solicited suppliers of the nature and scope of its new house, its efforts to secure new business would be doomed. The same would be true if McKesson were a newcomer trying to break into the market. A supplier cannot reasonably be expected to go in blindfolded.[13] To say that McKesson cannot inform suppliers of the products it proposes to include is to say that suppliers may not intelligently decide whether their products will receive the attention they deserve and whether the proposed new house seems viable.

A distributor must have a high profit Class A line to succeed, and Barton was a Class B line. (Tr. II: 401-402, 671, 674, VII: 2667-2669.) It was obviously reasonable for Barton to wish to know what primary lines the new house would carry. If in fact the Sea-

[13]The courts have recognized that manufacturers' decisions regarding the distributors of their products "are not made in a vacuum." *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899, 906 (D. Md. 1956), aff'd 239 F.2d 176 (4th Cir. 1956).

gram lines had already been committed to the new house or had indicated probable commitment, Barton would be entitled to take this into account in assessing its own position. If the jury found that Barton honestly believed that Hawaiian Oke could not do a good job for it without Class A lines, it must certainly be entitled to change.

The court's instructions produce the absurd result that Barton may go with any other distributor it desires but it cannot go to Portside. The jury was told to do so would be to participate in the plan, and this would be, *ipso facto* an unreasonable restraint of trade.

Even if the instructions had required findings of interdependence (i.e., that the success of the plan depended on the participation of both Seagram and Barton) and knowledge of Seagram and Barton of such interdependence, they would still have been erroneous.[14] If, as plaintiff argued, a new liquor distributing house by its very nature required more than one line, application of the per se rule to this situation would effectively prohibit the formation of new houses. Where the non-dealing is incidental to the establishment of a joint exclusive distributor, where the plaintiff is not treated differently from all other distributors, where there is no attempt to coerce or to exclude others from the market, and where the establishment of the new distributor is for legitimate business reasons and not part of a plan to monopolize,

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[14]The instructions contained no such requirement.

fix prices or engage in any other anticompetitive conduct, the rule of reason must be applied.

B. The Seagram Subdivisions Are Incapable of Conspiring Among Themselves (Error No. 6, App. p. xiii)

The court told the jury that the Seagram divisions were capable of conspiring among themselves. (Tr. VIII: 3204-3205.) It did not instruct the jury that they were to treat the divisions as separate only if they found the reorganization of Seagram was a sham or if they found that an agreement among the officers violated an established company policy. The court's instruction was erroneous for the reasons discussed in Point IA-1, *supra*.

C. A Parent Corporation May Lawfully Instruct Its Wholly Owned Subsidiary to Change Distributors

The court charged the jury that if Joseph E. Seagram & Sons, Inc. induced any of the Seagram divisions to initiate or join a "conspiracy" (i.e., a plan) to terminate Hawaiian Oke as distributor and establish Portside, this was an antitrust violation. (Tr. VIII: 3208.) This instruction is erroneous and unprecedented. It enabled the jury to impose liability if it found that Joseph E. Seagram & Sons, Inc. determined that its interests would be best served by a change of distributors by all three divisions and then urged the divisions to make the change.

If Barton knew of the alleged action of Joseph E. Seagram & Sons, Inc. in inducing the divisions to change and then accepted McKesson's solicitation, it too was liable under the court's instructions, since

the jury could have found that it thereby knowingly joined an existing conspiracy. (Tr. VIII: 3211-3212.)

The jury could have thus imposed liability even if it found no agreement or mutual understanding between any of the Seagram divisions or between Seagram and Barton. Such a state of facts is not within any decided cases on group boycott. There is no basis in precedent or policy for ruling that it constitutes a per se Sherman Act violation.

D. The Court Erred in Giving and Refusing Instructions on Conscious Parallelism

The court instructed the jury that parallel behavior alone was sufficient to establish a conspiracy. It ruled that while such behavior does not necessarily establish an agreement, ". . . parallel behavior is admissible circumstantial evidence from which you may infer agreement. . . ." (Tr. VIII: 3203.)

The court expressly refused to give the following, which was offered as proposed instruction B-9:

> The fact alone that two or more defendants dealt with plaintiff in a substantially similar manner (at or about the same time) does not support an inference of conspiracy even though each defendant may have known that the business behavior of the other was similar to its own. Similarity of operation does not prove a conspiracy unless there are circumstances which logically suggest joint agreement as distinguished from individual action.

The court also refused to give proposed instructions S-5 and S-11. (See App., p. xviii.) The court's

instruction does not correctly state the law, whereas proposed instructions B-9, S-5 and S-11 do.

> *Theatre Enterprises, Inc. v. Paramount Film Distributing Co., supra;*
>
> *Independent Iron Works, Inc. v. United States Steel Corp., supra;*
>
> *Delaware Valley Marine Supply Co. v. American Tobacco Co., supra.*

The court conceded that proposed instruction B-9 was a correct statement of the *Independent Iron Works* decision but it declined to follow it on the ground that it was wrong and that the statement was only dictum. (Tr. VIII: 3005.) The jury was thus permitted to infer a conspiracy from parallel behavior alone. This was error.

Although the foregoing arguments are, we submit, sufficient to dispose of this appeal, we will turn to some of the numerous errors on damages.

IV. THE COURT ERRED IN ADMISSION OF EVIDENCE ON DAMAGES

On the admission and exclusion of evidence of damages, the court virtually abandoned the rules of evidence. It repeatedly admitted prejudicial exhibits and testimony that fell far short of recognized standards of proof.

The fundamental error that led to this disregard of the rules of evidence was the court's misconception of the purpose and scope of the rule permitting re-

covery where damage can only be estimated by the jury.

See:

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931);
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

That rule was designed to preclude thwarting recovery where the nature of the violation made it impossible for the plaintiff to prove damage with mathematical certainty. It was never intended to abrogate the rules of evidence. As the Supreme Court said in *Bigelow:*

> . . . (T)he jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on *relevant data,* and render its verdict accordingly. (p. 264, emphasis supplied.)

The trial court construed *Story Parchment* and *Bigelow* as creating a license for admission of anything proffered by the plaintiff.

A. Admission of Exhibits to Prove That Plaintiff Had a Going Concern Value

Plaintiff made no claim for recovery of lost or prospective profits. (Tr. VIII: 2822, 3132.)[15] Instead it limited its claim to the market value of its business

[15]This was not inadvertent (see, e.g. Tr. VIII: 3122) but undoubtedly to avoid taxation at ordinary income rates. See *Raytheon Production Corp. v. Commissioner of Int. Rev.,* 144 F.2d 110 (1st Cir. 1944, cert. denied 323 U.S. 779 (1944); *Durkee v. Commissioner of Int. Rev.,* 162 F.2d 184 (6th Cir. 1947).

allegedly destroyed and alleged out-of-pocket losses. (Tr. I: 39; VIII: 2960, 2964.) First, the claim for lost market value.

1. Mathematical representations of counsel's argument were admitted as evidence

To prove market value in excess of that received on liquidation, plaintiff introduced charts prepared by Grant Caldwell, a CPA, purporting to show that plaintiff's business had a high profit potential and "goodwill" or "going concern" value before it ceased operating. (Exs. P-2, 3, 4, 5.)[16]

They were not offered as expert opinion. Caldwell disclaimed knowledge of how to determine the value of a business and did not vouch for the relevance of the charts. (Tr. III: 1155-56.)

When defendants asked him whether the projections represented sound accounting principles, plaintiff objected:

> Mr. Blecher: . . . the witness has made it clear that he has done nothing but a mathematical computation of certain things which I developed as a matter of legal theory as a basis for the claim of damages. . . . they are trying to cross-examine as though he is vouching for these and that he is an expert. . . .
>
> Mr. Anthony: That is argument, then.

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[16]Ex. P-2, a profit projection for 1965, used the first six months as a base. Ex. P-3 used the 1965 profit figure obtained in Ex. P-2, for projecting profits for 1966-1969. Ex. P-5 capitalized the average projected profit obtained for the 5-year period 1965-1969 to determine the market value in 1965. Ex. P-4 used figures of defendant McKesson to project plaintiff's profits.

> Mr. Anderson: . . . Mr. Blecher said that this man is not an expert. From what Mr. Blecher is saying, as I understand, this is merely a dummy Mr. Blecher. . . .
>
> Mr. Blecher: That is basically correct.
>
> (Tr. III: 1141.)

When Mr. Caldwell was asked if he would have relied on similar projections if he was representing someone interested in buying Hawaiian Oke, plaintiff again objected:

> If Mr. Anderson would like to establish Mr. Caldwell as an expert in acquisitions, he should proceed and do so as part of his own case. (Tr. III: 1152.)

The objection was sustained, as was a similar objection to a question on the need to examine the corporation's books. (Tr. III: 1154-55.)[17]

> Mr. Blecher: I object on the grounds that the witness has not been established by me . . . as an expert in this area. (Tr. III: 1154.)

Under no principle of law were these exhibits admissible in evidence. Theories of counsel are not evidence; nor are they a substitute for evidence.

Carroll v. Magnolia Petroleum Co., 223 F.2d 657, 665 (5th Cir. 1955);

Watn. v. Pennsylvania Railroad Co., 255 F.2d 854, 858 (3d Cir. 1958);

People v. Love, 56 Cal.2d 788, 366 P.2d 33 (1961);

6 *Wigmore on Evidence* (3d ed) §1806.

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[17]Caldwell had not examined plaintiff's books. (Tr. 1154.)

As representations of counsel's damage theory, they were devoid of probative value. Although the witness through whom they were offered expressed his agreement with certain aspects of them, he did not purport to be an expert in business valuation. His only function was as a "dummy" to lend an air of authority to counsel's damage theory.

To have any relevance as evidence, the charts would have to represent a witness's opinion of 1965 market value; and the witness would have to qualify as an expert so that his opinion would have probative value. II *Wigmore on Evidence* (3d ed.) §§560, 1917.

Submitting the charts to the jury through a sworn witness (whether or not an expert) cloaks them with testimonial value they do not have. The jury sees impressive charts and hears accounting terminology of a CPA explaining them. Plainly, the jury either viewed the charts as expert testimony (despite disclaimers) or at least gave the argument undue weight because they believed it had the sanction of an expert.

Furthermore, defendants were deprived of effective cross-examination. They should have been allowed full cross-examination.

> *Standard Oil Company of California v. Moore, supra;*
>
> *William H. Rankin Co. v. Associated Bill Posters,* 42 F.2d 152 (2d Cir. 1930), cert. denied 282 U.S. 864 (1930).

While defendants were permitted limited cross-examination on the method of computation, no cross-

examination was permitted on the validity of the entire approach for the purpose of arriving at a value. (Tr. III: 1141, 1152-54.) Thus plaintiff presented the jury with impressive figures prepared by a CPA as "proof" of a going concern value in 1965 and at the same time immunized the witness from cross-examination.

Since plaintiff used the figures to construct a going concern value, obviously defendants should have been allowed to cross-examine the witness on them. *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 636 (3d Cir. 1964), cert. denied 379 U.S. 852. If Mr. Caldwell was not responsible for the assumptions underlying the charts, then the person responsible should have testified and been subject to cross-examination. *Berguido v. Eastern Air Lines, Inc., supra.* That it was counsel does not change matters. If he is responsible for the assumptions, he should have taken the stand and been subject to cross-examination. 6 *Wigmore on Evidence* (3d ed. 1940) §1806.

The error was substantial and prejudicial. The exhibits were the crux of plaintiff's claim of damages.

2. The exhibits were inadmissible as expert opinion

Plaintiff offered the charts as mathematical representations of counsel's damage theory. Cross-examination of Caldwell, however, made clear that he used some accounting in constructing them (Tr. 1175), although the extent was never disclosed. However, the trial court viewed the exhibits, in part at least, as

expert opinion, since it permitted the jury to so treat them. (Tr. III: 1172-73; VIII: 3193.)

The result was that the exhibits came in as a hybrid between expert opinion and the argument. They should have been excluded on the further ground that to whatever extent they represented expert opinion, the threshold requirements for their admission had not been met.

a. **No Foundation Was Laid to Qualify Caldwell As Competent to Assess Plaintiff's Market Value or to Estimate Its Future Profits**

A party seeking to introduce expert opinion in evidence must first lay a foundation showing that the witness possesses some specialized skill that makes his opinion admissible.

> *Spitzer v. Stichman,* 278 F.2d 402, 409 (2d Cir. 1960);
>
> *Callendar v. Hunter Motor Lines, Inc.,* 327 F.2d 754 (4th Cir. 1964), cert. denied 379 U.S. 852;
>
> *Weber v. Brunswick Corp.,* 368 F.2d 480 (10th Cir. 1966);
>
> *State v. Damico,* 213 La. 765, 35 So.2d 654 (1948);
>
> 2 *Wigmore on Evidence* (3d ed.) §§560, 1923.

Here, the charts related to market value in 1965 and anticipated profits insofar as they would be relevant in determining market value. No attempt whatever was made to establish Caldwell's expertise in this regard. The only indication of any expertise was counsel's remark:

> "Mr. Blecher: What I said in the pre-trial statement is that though this witness is an expert, as to his qualifications, he will not in any sense be giving us 'expert testimony' in the traditional sense of this consequence." (Tr. III: 1072-73.)

Counsel then stated that he was being offered only as "an expert in computation" (Tr. 1073) and that he possessed no expertise relative to the valuation of a business. (Tr. III: 1141, 1152-54.) Caldwell confirmed this. (Tr. III: 1155-56.)

b. The Exhibits Were Irrelevant to the Issue, Which Was the Market Value of the Business

The charts were introduced to prove that plaintiff had a market value higher than the value of its tangible assets on liquidation. To show this, they purported to prove that plaintiff had a high profit potential. The additional value of a business based on expected future profits is its "going concern" or "goodwill" value. *Standard Oil Company of California v. Moore, supra.* In that case, this Court held that the appropriate factors to be considered in determining if a business had a going concern value are those ". . . which would influence a prospective purchaser" and that any value from an asset not transferable was irrelevant. (251 F.2d 219-220.)

Here, nothing indicated that the projections in the exhibits would influence a prospective purchaser. Attempts to ascertain their relevance were rebuffed on the ground that Mr. Caldwell knew nothing about valuing a business. (Tr. III: 1141, 1152-54.) No other

evidence was introduced to establish a logical connection between these projections and the value of the business to a prospective purchaser.

The charts included income from sources not transferable, e.g., income from the Seagram and Barton distributorships, although plaintiff had no transferable franchise with either. This was admitted. (Tr. II: 459.) The contracts with Seagram are Exhibits S-10, S-11 and S-12. There was no contract at all between Hawaiian Oke and Barton. (Tr. II: 503.)[18]

The projections included income from a leasehold which in 1963 had been transferred to Thelma Wong for the express purpose of preventing it from going with the corporation if it were ever sold. (Tr. I: 259-61.) Notwithstanding the transfer, the corporation collected the rents until October 1965. (Tr. VII: 2609.) The leasehold was not owned by plaintiff in 1965. To obtain it a purchaser would have had to buy it from Mrs. Wong. Any income from it was not properly included in profit projections designed to show market value.[19] Proposed instructions B-50 and M-11, which would have made this clear, were refused. (Tr. VIII: 3030-3031, 3114.)

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[18]The contracts did not add to the value of the business. The remaining distributorship contracts were not sold in liquidation. Old Mr. Boston distributorship was simply taken over by Sam Wong. (Tr. I: 303; IV: 1555; V: 2125.)

[19]Any expenses properly attributable to the rental property should of course also be excluded. Plaintiff's financial statements, however, do not indicate the amount of such expenses.

c. **The Exhibits Are Based on Assumptions Not Warranted by the Evidence**

Plaintiff's own financial statements, summarized in Exhibit P-1, show plaintiff's earnings history:

Year	Net Profit or (Loss) from Operations	Total Net Income (Loss)
1959	$(55,486.63)	$(45,589.73)
1960	$(55,583.20)	$(46,240.93)
1961	$(65,922.28)	$(50,179.54)
1962	$(16,505.59)	$ 8,060.80
1963	$(13,808.63)	$ 2,640.99
1964	$(18,767.92)	$ 2,497.85

Despite this Exhibit P-2 purported to show that plaintiff's total net income in 1965 would have been $45,256 had it continued in business throughout the year. Exhibit P-3 purported to show that profits for the next four years would have been approximately $53,000, $62,000, $72,000 and $82,000 respectively. No evidence showed any change in plaintiff's business to explain this remarkable turnabout. These figures were derived by a series of manipulations. These can be summarized:

(1) Plaintiff compared its income for the first six months of 1964 (Ex. P-105) with the full year (Ex. S-3) and found that second-half sales and costs were higher than the first half, while operating expenses were lower.

(2) It assumed that the same pattern would have existed in 1965 and applied the 1964 second-half percentages to its 1965 first-half figures.[20] Result: profit

[20]The result was an *increase* in sales of $230,000 and a *decrease* in operating expenses of $80,000. The projected total sales of $1,506,237 exceeded the $1,200,000 of sales predicted by Ted Wong by over $300,000. (Tr. II: 596, 597, 644, 646.)

for 1965, $45,256 or an 1800% increase over the previous year.

(3) It then reviewed the actual figures for 1962-1964 with the hypothetical figures for 1965 to determine a "trend". It found an "annual average percentage increase" of 9.23% for sales and 11.6% for gross profits.

(4) It selected (without explanation) one-half of the gross profit increase, or 5.8%, as the average annual percentage increase for operating expenses.

(5) It applied these percentages to the hypothetical 1965 figures, obtaining an average annual projected profit of $63,349 for the years 1965-1969.

(6) It capitalized the $63,349 by multiples of from 5 to 10 to suggest the fair market value of the business in 1965.

(7) Finally, it deducted $149,611, a figure purporting to represent the amount distributed to stockholders in liquidation, to produce the value of the business.

Each of the foregoing assumptions is without factual or rational basis, some in direct conflict with the evidence.

Plaintiff's records show that while its operating expenses in the second-half of 1964 were about $3000 lower than those in the first-half, for the second-half of 1963 they were about $2000 higher than the first-half (Exs. P-1, M-25), and for the second-half of 1962, they were about $3000 higher than the first-half (Exs. P-1, M-24).

The assumption is nonsensical as well as arbitrary. The application of the 1964 percentages to the 1965 first-half figures results in a hypothetical $230,000 increase in sales and a hypothetical $80,000 decrease in operating expenses. In other words, the greater the volume, the lower the expenses. Mr. Caldwell conceded that normally one would expect the opposite. (Tr. III: 1236.) Plaintiff's own financial statements show that its operating expenses normally followed sales. From 1959 to 1963, operating expenses rose when sales rose and fell when sales fell. (Ex. P-1.) The one exception was 1964, when an increase in sales was accompanied by an $872 decrease in operating expenses. (Ex. P-1.)

Although Caldwell gave no explanation for the absurd result, the answer is clear. The application of the 1964 percentages to the 1965 first-half figures was based on a false assumption. Caldwell noted that plaintiff's operating expenses for the first-half of 1965 had declined, while its sales increased. (Tr. III: 1236; Ex. P-2.) Rather than attempting to find the explanation (the July 1 tax increase), he merely accepted the advice of plaintiff's counsel that there was nothing out of the ordinary about the first six months of 1965. (Tr. III: 1093-1094.)

This assumption flies directly in the face of the evidence and destroys the probative value of the exhibits. Had Caldwell looked at plaintiff's books, he would have learned that the first six months' figures were unusual. Plaintiff's monthly sales for the first six months of 1962-1965 were:

	1962	1963	1964	1965
January	$ 81,796	$ 86,085	$ 89,904	$ 82,455
February	82,405	84,306	93,304	100,184
March	97,855	101,156	97,968	113,858
April	90,001	100,364	114,825	104,497
May	86,793	95,649	105,158	93,667
June	97,751	97,590	99,092	212,318

(Exhibit M-52)

Twenty-three of these twenty-four months show sales of between $81,000 and $115,000. One month, June 1965, shows sales of $212,000, more than double the sales of any other June and almost $100,000 higher than the sales of the next highest month.

In the spring of 1965, the Hawaii Legislature increased the excise tax from 16% to 20%, effective July 1, 1965, Act 155, S.L. Hawaii 1965. This led retailers to stock up in June to avoid the tax increase (Tr. IV: 1693-94.)

The June balloon of plaintiff's sales was explained by Ted Wong in letters to the suppliers. On April 23, 1965, he wrote:

> Heavy buying—3-4 months supplies is expected in early June. Therefore heavy inventories must be stocked as soon as possible. . . . we will be under tremendous workloads to sell in June . . . . (Ex. M-57.)

This was followed three days later:

> Reference to my letter on TAX situation in Hawaii. Will appreciate whatever you can do to RUSH these goods to us to arrive Honolulu about June 1. . . . (Ex. M-58.)

Mr. Caldwell, relying on Wong and counsel, assumed that the tax increase had no bearing on sales or earnings for the first six months of 1965. (Tr. III: 1094, 1100, 1237.) He testified:

> Q. You don't know anything how the tax increase affected the business?
>
> A. No sir, except to the extent that I was advised that it had no bearing on the first six months. (Tr. III: 1237.)

The assumption that there was nothing unusual about the first half of 1965 was patently false. The resulting hypothetical \$230,000 increase in sales, \$80,000 decrease in operating expenses, and 1800% increase in net income are absurd conclusions.

For the trial court to permit the jury to decide the case on this kind of "evidence" was ". . . to give judicial blessing to a decision based on speculation, surmise and conjecture." *Wolfe v. National Lead Co.,* 225 F.2d 427 (9th Cir. 1955), cert. denied 350 U.S. 915 (1955). Nothing in *Story Parchment, Bigelow* or any other case sanctions this kind of exercise in fantasy.

The liberal standard of proof established by *Story Parchment* and *Bigelow* assures that an injured plaintiff will not be denied recovery simply because the nature of the violation makes computation of the precise amount impossible, but it does not go so far as to give competency to any figures proffered by a plaintiff, regardless of how unfounded or false the assumptions are upon which they rest.

To permit a verdict to be rendered on the basis of this sort of material makes a mockery of the law of

evidence and trial by jury. This was recognized by Judge Friendly in *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir. 1962, cert. denied 369 U.S. 865 (1962)):

> There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high. Yet it is the jury system itself that requires the common law 'judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning . . .' These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it. (p. 912.)

The soundness of this caveat is recognized in many cases where the admission of fanciful damage theories based on unreasonable or fallacious assumptions has been held erroneous.

In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1, 30 (9th Cir. 1960), mod. 289 F.2d 933, rev'd on other grounds, 370 U.S. 19, this Court held it error to admit testimony of an expert accountant in response to a hypothetical question embodying unfounded and fallacious assumptions:

> The expert opinion was a guess based on conditions contrary to fact. (p. 34.)

To the same effect:

Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra;

Syracuse Broadcasting Co. v. Newhouse, 319 F.2d 683, 688 (2d Cir. 1963);

Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 83-84 (7th Cir. 1950), mod. on another ground, 340 U.S. 558 (1951);

Baush Machine Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935).

See also:

Taylor v. Heller & Co., 364 F.2d 608 (6th Cir. 1966);

Carroll v. Magnolia Petroleum Co., supra.

In *Lewis v. United States,* 369 F.2d 595 (5th Cir. 1966), the court said:

> . . . (I)n order for the opinion to have any value, it must be based on assumptions which the trier of the facts can find to have been proved. (p. 602.)

The charts embody other unwarranted assumptions. Plaintiff determined that its hypothetical 1965 sales were 18.31% greater than 1964 sales. It then used the 18.31% figure to arrive at a projected sales growth rate of 9.23%. Plaintiff's actual growth rate for 1963 and 1964 was 4.7%. The 9.23% figure has no evidential basis and represents nothing more than unfounded optimism. *Baush Machine Tool Co. v. Aluminum Co. of America, supra* at 227.

The use of one-half the projected gross profit growth rate, or 5.8% for the projected increase in operating expenses was purely arbitrary. No explanation was given, and the rationale, if such there was, underlying its selection remains a mystery. Opinion evidence based on unexplained assumptions is inadmissible.

> *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 473 (9th Cir. 1964), cert. denied 377 U.S. 993 (1964);
>
> *Emich v. General Motors Corp., supra* at 83.

In the *Lessig* case, this Court stated:

> Such opinion testimony is admissible, but only if based upon facts which support it. . . . There was no offer to show how his estimate was made. The testimony was inadmissible, absent the foundation. . . . (p. 473.)

In addition, no explanation was given why the particular earnings multiples appearing in Exhibit 5 were selected or whether any of them would be appropriate in valuing plaintiff's business on cross-examination was emasculated. (See Tr. III: 1146.)

Again, the $149,611 attributed to distribution to the stockholders was pure speculation. This was never authenticated by any witness.

On cross-examination, Ted Wong was asked about the figures that appeared on Exhibit P-5 as follows:

1965 Distributions	$101,880
1966 Distributions	43,853
Balance of net assets	3,878
	$149,611

Wong was unable to vouch for them. He said he "believed" the $101,880 represented cash received by the stockholders (Tr. V: 1922) and that the $43,853 represented distributions in kind. (Tr. 1924.) When asked how it was arrived at:

> I believe the attorney-accountant, to the best of my knowledge, took the book figure of what was on the books and pulled it out. That's about all I know about that. (Tr. V: 1924.)

No witness attested to the accuracy of the figure. Nor was there any evidence that the book value, if in fact that was the figure used, represented the actual value of the assets distributed or even a reasonable estimate.

This is not a case where any unlawful conduct of defendants made ascertainment of the actual figures impossible. The amount realized on liquidation is uniquely within plaintiff's knowledge. It must produce the best available evidence of the impact of defendants' conduct on its business. *Riss & Co. v. Ass'n of American Railroads,* 190 F.Supp. 10, 18 (D. D.C. 1960). Although verdicts based on speculation and guesswork are not permitted in any event, this principle has especial force when the speculation is due to the plaintiff's failure to come forward with proof peculiarly within its possession.

In sum, the exhibits are based on an assortment of hearsay, conjecture, surmise and false and unfounded assumptions, some directly contrary to the undisputed facts.

3. **The court erred in allowing use of McKesson as a "yardstick" to measure plaintiff's market value**

Exhibit P-4 represented an alternate method of valuing the business. It used McKesson figures to project plaintiff's profits for 1965-1969. The average thus obtained was capitalized in Exhibit P-5 in the same manner as the $63,349 figure produced by Exhibit P-3. These computations suffer from the defects discussed above, and further, no foundation was laid to establish the comparison. (Tr. III: 1136, 1139.)

Exhibit P-4 was constructed as follows:

(1) Mr. Caldwell determined McKesson's ratio of net income (before taxes) to sales for the fiscal years ending March 31, 1963, 1964 and 1965.

(2) He determined that McKesson's net profit averaged 3.05% of net sales for the three-year period.[21]

(3) He then assumed that had plaintiff remained in business, its earnings would have borne the same relationship to its sales.

(4) The 3.05% was then applied to plaintiff's hypothetical sales from Exhibits P-2 and P-3, which produced an average annual projected profit of $55,240.

The "yardstick" approach is permissible where two businesses are comparable and where the method of

[21]The use of the pre-tax figure was meaningless for purposes of valuing the business. The only meaningful figure is the amount that would be available as a return on the purchaser's investment. McKesson's average profit after taxes was 1.37%. (Ex. P-29.)

comparison itself is rational. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1952), cert. denied 343 U.S. 942 (1952). But where no sound basis for comparison is shown or the assumptions underlying the comparison are unsupported, the "yardstick" approach has been rejected.

> *Flintkote v. Lysfjord, supra;*
> *Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra* at 392;
> *Fargo Glass & Paint Co. v. Globe American Corp.,* 201 F.2d 534, 540 (7th Cir. 1953); cert. denied 345 U.S. 942 (1953);
> *Homewood Theatre v. Loew's, Inc.,* 110 F. Supp. 398 (D. Minn. 1952).

There was no evidence of the comparability of McKesson and Hawaiian Oke. No attempt was made to determine if their profit margins, facilities or operations were comparable. (Tr. III: 1137-39.)

Plaintiff simply assumed that every liquor distributor in Honolulu would have the same profit margin. This broad-brush approach has been rejected by the courts. While plaintiff need not show that the two businesses are comparable in detail, the cases make clear that it must do more than prove they are in the same general business. The evidence in the record establishes the lack of comparability.

Comparison of the actual profit margins of the two firms removes any doubt as to the invalidity of the "yardstick" test. According to plaintiff's own figures

(Ex. P-1) its profit margins, including rental income, were:

Year	Sales	Total Income	Ratio of Total Income to Sales
1962	$1,161,526.02	$8,060.80	0.70%
1963	1,215,602.13	2,640.11	0.20%
1964	1,273,152.41	2,497.85	0.20%
		Average:	0.40%

Thus, McKesson's 3.05 ratio of net income (before taxes) to sales was over seven and one-half times that of plaintiff—even when the latter's rental income is included. Plaintiff, without explanation, urged that for 1965-1969, it was reasonable to apply McKesson's profit margin to plaintiff's hypothetical sales. This assumption was not only unfounded but in direct conflict with the evidence.

Exhibit P-4 piles speculation on speculation. It does not rise to the level of "relevant data." No verdict based on such "evidence" could possibly meet the "just and reasonable" test of the *Bigelow* case.

B. Evidence of Expressions of Interest in Purchasing Plaintiff's Business Was Erroneously Admitted

Ted Wong testified over objection that certain individuals expressed interest in purchasing its business. (Tr. I: 209-219.) This testimony was irrelevant.

If a mere expression of interest proves anything, it proves no more than that plaintiff's business had some value. But this was not the issue. The only questions before the jury were:

(1) Did the business have any value *over the amount realized on liquidation,* and

(2) If so, how much?

In no instance mentioned by Wong was there an actual offer nor any mention of price. Two persons that indicated interest abandoned it on seeing plaintiff's financial statements. (Tr. V: 1812, 1823-34.)

Despite lack of probative value, the evidence was received and the jury told that it could use such expressions in determining damages. (Tr. VIII: 3216-17.) The court also admitted a letter expressing an interest. (Ex. P-54; Tr. I: 211-215.) The admission of Wong's testimony and this letter, coupled with the court's instruction, was prejudicial error. *Dantzler v. Dictograph Products, Inc.,* 309 F.2d 326 (4th Cir. 1962), cert. denied 372 U.S. 970.

C. The Court Erred in Admitting Evidence of Plaintiff's Out-of-Pocket Losses

Plaintiff's annual profits and losses from 1959 through 1966 were admitted over objection.

The only out-of-pocket losses recoverable are those proximately caused by defendants' unlawful conduct. *Flintkote v. Lysfjord, supra.* Since the conspiracy was alleged to commence in June 1965, it could hardly have caused pre-1965 losses. As to 1965 and 1966, the exhibit shows simply that losses were sustained. No attempt was made to establish a causal connection between them and any act of defendants. From all that appears, the figures include plaintiff's normal operating losses sustained in every one of its

last six years in business. Absent a showing of causal connection, the exhibit was inadmissible. *Talon, Inc. v. Union Slide Fastener, Inc.,* 266 F.2d 731 (9th Cir. 1959); *Dantzler v. Dictograph Products, Inc., supra* at p. 320.

V. ERRORS IN INSTRUCTIONS ON DAMAGES

A. The Instructions Given

Over objections of defendants (Tr. VII: 2821, 2822, 2854, 2855, 2860, 2863-2869, 2879, 2881-2883; VIII: 2931, 2944, 2959-2962, 2965, 2967), the court gave plaintiff's instructions 26 (revised) and 37). These instructions were erroneous:

(1) The jury was told it could consider the question of future profits. (Tr. VIII: 3216.) This was misleading. Future profits were not an issue except as they bore on market value in July 1965. Especially in view of Caldwell's exhibits and Ted Wong's testimony, all relating to future profits, the effect of this instruction was to permit the jury to make an award for future profits.

(2) The instructions permitted the jury to take into account the expressions of interest of third parties in acquiring plaintiff's business. (Tr. VIII: 3217.) The irrelevance of such expressions of interest to the actual damage has been pointed out above.

(3) The instructions permitted the jury to award recovery for out-of-pocket losses in 1965 and 1966. (Tr. 3217.) There was no evidence of any out-of-pocket losses caused by defendants.

(4) The instructions permitted the jury to treat the Caldwell exhibits as bona fide expert testimony when they were nothing more than the arguments of counsel. (Tr. VIII: 3193.)

B. The Instructions Refused

(1) Instructions B-50 and M-11, which would have instructed the jury that they were to disregard the rental income from the leasehold property held by Thelma Wong, were refused by the court over objection. (Tr. VIII: 3030, 3031, 3114.) The rental income made the difference between a small profit and a perfect record of losses. The jury might well have viewed the damage question in an entirely different light had they been dealing with a business with no past profits at all, rather than being permitted to view plaintiff as a corporation that had started to earn small profits. The inclusion of the rental income compounded the errors in the Caldwell exhibits.

(2) Defendants submitted an instruction that would have told the jury that Exhibits P-2, P-3, P-4 and P-5 were not to be treated as expert testimony. (Instr. B-51; Tr. VIII: 3033.) This was vital in view of the court's own instruction expressly allowing the jury to consider any charts prepared by an accountant as bona fide expert testimony. (Tr. VIII: 3193-94.) While it is arguable that the instruction given might have some justification with respect to Exhibits P-106 through P-114, it was grossly improper as to the projections.

(3) The court refused (Tr. VIII: 3035) to give Instruction B-52, which would have told the jury:

> You are not to assume that a business must be worth more while it is operating than it is after it stops operating. This may or may not be true.

This instruction fairly states the law. See, *Standard Oil of California v. Moore, supra,* and defendants were entitled to it. There was no basis for its refusal. (Tr. VIII: 3035, 3216, 3217.)

(4) Instruction M-C would have made clear to the jury that plaintiff was not claiming any lost or prospective profits. Especially in view of the instruction actually given by the court, defendants were plainly entitled to it. However, it was refused. (Tr. VIII: 3122-23.)

The court's charge to the jury was clearly erroneous.

CONCLUSION

We submit that this verdict cannot stand. There was no evidence of any agreement between Barton and Seagram, no evidence of any unreasonable, restraint, no evidence of any unlawful or anti-competitive purpose or any attempt to coerce or injure Hawaiian Oke. Giving plaintiff the benefit of every reasonable inference from the facts proved, the case should have been dismissed at the close of plaintiff's evidence.

The court below committed repeated errors in the omission and exclusion of evidence and in charging the jury. Despite this, there still was no evidence on

which the jury could have found a conspiracy, or an unreasonable restraint of trade or a per se violation of the Sherman Act. Nor was there any competent evidence in the record that plaintiff suffered damage resulting from any unlawful conduct of defendants. The judgment should be reversed with direction to enter judgment dismissing the complaint.

Dated, Honolulu, Hawaii,
February 14, 1968.

Respectfully submitted,

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Arthur B. Reinwald,
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and The House of Seagram, Inc.

Herbert Y. C. Choy,
Attorneys for Appellants
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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Garner Anthony,
Attorney.

(Appendix Follows)

Appendix

Appendix A

TABLE OF EXHIBIT REFERENCES

PLAINTIFF'S EXHIBITS

Exhibit No.	Identified	Offered	Received
1	Tr. 1037	Tr. 1039	Tr. 1039
2	1092	1095	1104
3	1092	1109	1129
4	1092	1130	2679
5	1092	1147	2679
6	1092	1149	1150
7	1039	1040	1040
9	1043	1046	1047
17	1089	1090	1092
17-B	1079	1089	1089
18	755	755	758
19	755	755	758
20	755	755	758
21	755	755	758
22	1085	1085	1086
23	1085	1085	1086
24	1085	1085	1086
25	755	755	758
27	755	755	758
28	755	755	758
29	755	755	758
30-41	3037	3037	3038
42	1014	1014	1014
43	1010	1012	1013
54	211	212	215
59	220	220	221
63	175	176	176
64	176	178	178
65	2660	2660	2660
67	1348	1348	1349
68	175	176	176
69	806	806	807
70	177	178	178
71	684	686	686
72	366	366	366
73	737	738	738
74	737	738	747
75	743	747	747
76	2400	2400	2400
77	1449	1449	1449

Exhibit No.	Identified	Offered	Received
79	1452	1453	1453
81	1621	1621	1623
82	1621	1621	1629
83	1585	1586	1586
84	1587	1588	1589
88	161	161	162
99	187	205	206
100	188	205	206
101	578	578	579
102	600	600	600
103	602	603	603
104	609	610	610
105	1008	1009	1010
106	1047	1048	1048
107	1050	1051	1052
108	1055	1055	1055
109	1057	1058	1058
110	1060	1061	1061
111	1062	1062	1063
112	1065	1065	1065
113	1067	1068	1069
114	1073	1078	1078
115	876	880	880
116	936	936	936
117	938	938	938
118	1021	1023	1030
119	1023	1023	1030
120	1031	1032	1033
120-B	2599	2689	2689
121	1030	1032	1033
122	1086	1087	1087
123	1787	1788	1790, 1801
124	1800	....	....
125-143	1998	2000	2002
144	2023	2023	2024
145	2006	2006	2006
146	2007	2008	2008
147	2016		
148	2017		
149	2017		
150-154	2031	2052	2052
155	2116	2117	2117
156	2117	2117	2118

SEAGRAM'S EXHIBITS

Exhibit No.	Identified	Offered	Received
1	Tr. 572	Tr. 572	Tr. 573
2	572	572	573
3	572	572	573
4	572	572	573
5	572	572	573
6	3038	3038	3038
10	570	570	571
11	570	570	571
12	570	570	571
13	2541	2549	2549
14	2549	2558	2559
17	2513	2513	2514
18	2514	2514	2514
19	2514	2514	2514

McKESSON'S EXHIBITS

Exhibit No.	Identified	Offered	Received
2	Tr. 3039	Tr. 3039	Tr. 3039
3	3039	3039	3039
4-16	3039	3039	3039
18	3040	3040	3040
19	1988	1989	1989
20	1919	1921	1921
21	1920	1921	1921
22	1919	1921	1921
22-a	1920	1921	1921
23	627	630	632
24	1099	....	1103
25	1099	....	1103
26	1197	1197	1198
28	2128	2128	2129
29	1706	1707	1708
32	2133	2133	2133
33	2138	2138	2138
34	2171	2171	2171
35	1826	1826	1827
37	2586	2586	2586
39	2584	2584	2584
41	1834	1835	1835
42	1871	1871	1872
43	1829	1829	1829
44	1830	1830	1831
45	2670	2672	2672
47	1700	1700	1701
48	1722	1721	1722
49	1722	1721	1722
50	1721	1721	1722
51	1721	1721	1722
52	1722	1721	1722
53	1738	1747	1749
54	1750	1757	1758
55	1760	1767	1767
56	1768	1769	1770
57	1696	1697	1697
58	1701	1702	1702
59	1703	1704	1704

Exhibit No.	Identified	Offered	Received
60	1699	1699	1699
61	1867	1868	1868
62	1911	....	....
63	2232	2235	2235
64	2233	2235	2235
65	2235	2235	2235
66	2239	2239	2239
67	2242	2242	2243
68	2243	2244	2244
69	2244	2244	2244
70	2244	2244	2244
72	2063	2063	2064
73	2076	2077	2077
74	2198	2199	2199
75	2218	2218	2219
76	2704	2704	2705

BARTON'S EXHIBITS

Exhibit No.	Identified	Offered	Received	Rejected
1	Tr. 316	Tr. 316	Tr. 316	
2	3038	3038	3038	
3	2196	2196	2196	
4	3038	3038	3038	
5	3038	3038	3038	
6	516	516	517	
7	284	286	287	
9	3038	3038	3038	
10	2190	2191	2191	
12	3038	3038	3038	
13	3038	3038	3038	
13-A	1925	1925	1925	
14	1932	1936	1936	
14-A	1996	1996	1997	
14-B	1996	1996	1997	
14-C	1996	1996	1997	
22	2316	2316	2316	
23	483	484	484	
24	486	486	487	
25	488	488	488	
28	489	489	489	
29	491	491	491	
33	492	492	492	
34	826	827	827	
35	494	494	494	
37	2317	2317	2317	
38	495	495	496	
42	497	497	498	
44	476	476	476	
45	478	478	478	
48	499	499	499	
49	480	480	480	
57	523	523	525	
58	525	525	526	Stricken—910
59	525	525	526	Stricken—910
60	525	525	526	Stricken—910
61	525	525	526	Stricken—910
63	2317	2317	2317	
64	2318	2318	2318	

Exhibit No.	Identified	Offered	Received	Rejected
66	841	841	841	
67	862	863		867
68	1344	1345		1346
70	1980	1986	1987	
71	2086	2085	2086	
72	2086	2086	2086	
73	2086	2086	2086	
74	2086	2086	2086	
75	2086	2086	2086	
76	2147	2150	2151	
77	2157	2157	2158	
78	2160	2160	2160	
79	2165	2165	2165	
80	2167	2168	2168	
81	2201	2202	2203	
82	2201	2202	2203	
83	2201	2202	2203	
84	2315	2315	2315	
*84	2688	2688	2688	
85	2315	2315	2316	
86	2601	2601	2601	
87	2689	2689	2689	

*Substituted for first Exhibit B-84.

Appendix

Exhibit S-17

JOSEPH E. SEAGRAM & SONS, INC. (Manufacturer)

Edgar Bronfman, President
Jack Yogman, Executive Vice President

THE HOUSE OF SEAGRAM, INC.

(distributing agent for Joseph E. Seagram & Sons, Inc.)

Unincorporated divisions of THE HOUSE OF SEAGRAM, INC., distributing products in Hawaii:

EAGRAM	**CALVERT**	**FOUR ROSES**	**FRANKFORT**
	Al Fleischman (V.P. Sales)	Jack Wishny (President)	Roy Flint (V.P.)
	Arthur Murphy (President)	Edwin Kaufman (Div. Mgr.)	Max Morgenthau (former Div. Mgr.)
	Gerald Novak (Div. Mgr.)		Joe Flick (Div. Mgr.)
	Emilio Gonzales (former Sales Mgr.)		

cKESSON & ROBBINS	**BARTON**	**HAWAIIAN OKE**
. J. Bertrand xecutive V.P.	Ralph Ettlinger Executive V.P.	Henry Awa Wong President
oe Cotler .P. Asst. to xec. V.P.	Sheldon Friedman Sales Manager	Theodore K. T. Wong General Mgr., V.P.
. J. Maloney ice President	Oscar Getz Chairman of Board	Samuel F. Wong Manager (sales)
be Kauhane ivision Mgr.	Arnold Frisch Former V.P.	David K. K. Wong General Mgr. to 1961
	Sydney Weinstock V.P. (Sales Mgr.)	Thelma Wong President & Director
	Ralph Silver Fin. V.P.	Dick Yin Wong Secretary-Director

SPECIFICATION OF ERRORS

ERROR NO. 1

The court erred in holding that the evidence was legally sufficient to support the verdict.

It erred in denying the motion for a directed verdict (Tr. IV: 1670, 1672, 1677; R. 279, 282), in denying motions for judgment n.o.v. (R. 300, 302, 305) and in denying the motion for a new trial (R. 302, 306).

ERROR NO. 2

The court erred in admitting the testimony of Ted Wong that Friedman of Barton told him that he (Friedman) did not know why Barton had changed distributors, but "guessed" that it was because of a "deal" between Barton and McKesson in California and that he "guessed" Seagram changed because of another "deal" between Seagram and McKesson in Europe; and in overruling motions to strike this testimony. (Tr. I: 167-168; II: 556-565.)

1. The Testimony and Objections

Ted Wong testified on direct (Tr. I: 167-170):

> Q. Did you have any further conversation with Mr. Friedman . . . as to the reasons why your distributorship arrangements . . . were being terminated?
>
> A. I asked him why this arrangement was being ended, and he told me he didn't know; probably it would be a deal that McKesson would get Barton distribution in the West Coast. . . .

Mr. Anderson: . . . it sounded to me very much like speculation, hearsay on hearsay.

. . . .

The Court: The objection on the basis set forth is overruled. However, it is being received not for the purpose of the representation that it is true, . . . but . . . to show the state of mind. . . . (Tr. I: 168.)

The Witness: And in turn they would receive distribution here in Hawaii. And I asked him why would Seagram be involved. And he stated, well, maybe they have a deal someplace, maybe in Europe.

The Court: The same objection and the same ruling. This is simply to show what Friedman is saying at the time, . . .

Mr. Anderson: . . . I object to the testimony that this witness has given concerning the reasons that Friedman announced to him as to why Seagram might be involved in this as clearly, by even Friedman, highly speculative. Second, the state of mind of Mr. Friedman by Mr. Wong is not at issue at this stage of the game, at this point.

Mr. Anthony: ——It is not only hearsay; it is triple hearsay insofar as Seagram is concerned. . . .

Mr. Anthony: The witness has already given hearsay upon hearsay.

The Court: Have you any further argument?

Mr. Anthony: No.

The Court: The objection is overruled, for the same reasons.

Mr. Choy: The same objection.

The Court: Overruled for the same reasons

> . . . There is one other inference you are entitled to, but certainly this is for you to decide . . . you are entitled to analyze Friedman's statement in the light of whatever he says by way of excuse . . . and see what weight you shall give to the reasons he gave for the cancellation of this arrangement. That is an inference which you may or may not draw. You are finders of the fact and can take from what was said on this occasion whatever inference you want. (Tr. I: 170, 171.)

On cross-examination, the following occurred (Tr. II: 557-558):

> Mr. Anthony: You recall that you testified earlier on the taking of the deposition that this was just a guess on his part. Do you remember that?
>
> A. Yes.
>
> Mr. Anthony: Now, if your Honor please, I move to strike all of this testimony in regard to that conversation, and I respectfully request that your Honor take a look at 6 Wigmore, page 178. Mind you, this is a hearsay declaration. It is not based on any testimony or knowledge your Honor, and it is a guess. And Wigmore says:
>
> "The witness must speak as a knower, not as a guesser."
>
> . . . .
>
> The Court: Who is the witness here?
>
> Mr. Anthony: This is the witness.
>
> The Court: No.
>
> Mr. Anthony: The declarer is the witness.
>
> The Court: Friedman is the witness?
>
> Mr. Anthony: That's right. And this was a guess, according to this witness.

The Court: It isn't this witness' conclusion.

Mr. Anthony: This was also Friedman's conclusion . . . And I now move to strike the entire testimony, both on direct and the present testimony of this witness.

The Court: Motion denied. Objection overruled.

Wong reaffirmed that what Friedman had told him about the possible deals was just a "guess" and that he knew of no facts to support it. (Tr. II: 561--564.) The motion to strike was renewed and denied. (Tr. II: 563.)

2. Grounds of Error

a. The fact that Friedman said that he guessed that there were "deals" elsewhere was irrelevant to any issues in the case and prejudicial to all defendants.

b. The only possible relevance of such a statement was to establish that there were in fact such "deals," in which case the evidence is inadmissible as hearsay and speculation.

ERROR NO. 3

The court erred in admitting evidence comparing plaintiff's performance before the change of distributors with McKesson's performance thereafter.

1. The Evidence and the Objections

a. Over objection, the court admitted Exhibits P-19, P-20, P-25, P-28 and P-29.

Exhibit P-19, Barton's Answers to Plaintiff's Second Set of Interrogatories, contains figures showing the 1965 sales of Barton products to McKesson.

Exhibit P-20, Barton's Answers to Plaintiff's Third Set of Interrogatories, contains figures showing 1966 shipments of Barton products to McKesson and 1966 McKesson depletions of Barton products.

Exhibit P-25, McKesson's Answers to Plaintiff's Interrogatories, contains figures showing the 1965 shipments received and sales by McKesson of Barton, Calvert, Four Roses and Frankfort products.

Exhibit P-28 is a list of 1966 shipments received and sales by McKesson of Barton, Calvert, Four Roses, Frankfort, and Seagram Distillers Division products.

Exhibit P-29 is a compilation of McKesson's annual profit and loss statements, including those for 1965 and 1966.

These exhibits compiling sales and shipments after the change of distributors were objected to as irrelevant to any issue in the case but were admitted. (Tr. II: 756, 757.)

b. Barton claimed that it was dissatisfied with plaintiff's product mix, i.e., the ratio of sales of brown goods (scotch, bourbon, whiskey) to sales of white goods (gin, rum and vodka). After questioning Friedman of Barton about plaintiff's ratio, plaintiff's counsel cross-examined on the Portside ratio and purchases in 1966. (Tr. II: 813.)

The objection to the evidence was made. (Tr. II: 813, 815, 821, 824.)

> Mr. Anthony: We take the position that none of this arithmetic, after the filing of the lawsuit in 1966 has the slightest bit of any evidence of any conspiracy in 1965. The only purpose of permitting that evidence in, that is, the performance in 1966, is in an effort on the part of plaintiff to show that in fact there was a conspiracy in 1965. And none of that is relevant and none of it is admissible in evidence . . .

c. Plaintiff offered in evidence Exhibit P-115, a chart containing figures indicating Portside's ratio of Barton brown and white goods after the change of distributors. The exhibit was admitted over the objection that the performance in 1966 after the change of distributors was irrelevant. (Tr. III: 880.)

d. Plaintiff offered Exhibit 17-A, a chart showing McKesson sales of wine and beers, including sales after the alleged conspiracy. The exhibit was received in evidence over the objection that McKesson's sales (1965 and 1966) after the suit was filed were irrelevant.

e. Plaintiff offered Exhibits P-106, P-107, P-108, P-109, P-110, P-111, P-112, P-113 and P-114. These exhibits are graphs representing depletions of Calvert, Four Roses, and Barton products by plaintiff, McKesson, and in certain cases, other distributors. They include depletions by McKesson in 1965 and 1966 after the change of distributors. Objections were

made that the charts for these years 1965 and 1966 were irrelevant. (Tr. III: 1048, 1051-52, 1055, 1058, 1061, 1062-63, 1065, 1068-69.)

f. Plaintiff offered Exhibits P-22, P-23 and P-24, Seagram's Answers to Plaintiff's Second, Third and Fourth Sets of Interrogatories (Tr. III: 1085-1086):

> Mr. Anthony: Your Honor, we object to the introduction in evidence of the answers to these interrogatories, first upon the ground, as already ruled on, that they contained operations in the year 1966. Second, they also enclose within the answers operations of McKesson in addition to the plaintiff.
>
> The Court: Objection overruled.

g. Plaintiff offered Exhibit 17-B, an analysis of the product composition of Portside's 1966 sales. The exhibit was received in evidence over defendants' objection that 1966 figures were irrelevant. (Tr. III: 1089.)

h. Plaintiff examined Abe Kauhane of McKesson on the difficulty in placing Calvert products since the change of distributors. This was objected to on the ground that events after the suit was filed were irrelevant. The objection was overruled. (Tr. VI: 2405.)

2. Error Asserted

Evidence of Portside's performance in 1965 and 1966 after the change of distributors is irrelevant to the issue of conspiracy. It does not logically tend to prove the absence of good business reasons by Seagram and Barton for changing distributors.

ERROR NO. 4

After plaintiff introduced the 1966 Portside figures to prove that Barton had no good business reason for making the change of distributors, Barton offered Exhibit B-67, a letter written in 1966 from Spengler & Sons, another Hawaii distributor, in response to an inquiry by Barton regarding the possibility of changing to Spengler from Portside. The letter B-67 was excluded. (Tr. III: 863-867.)

ERROR NO. 5

The court erred in instructing the jury that if the defendants had agreed or participated in a plan to establish the new McKesson house knowing that the result would be non-dealing with plaintiff, this was a per se violation of the Sherman Act (Tr. VIII: 3206-3209):

> Under the law applicable to this case, any seller, such as any of these three divisions of The House of Seagram, or Barton, may, acting alone, for any reason select the customers with whom it deals or refuses to deal. However, if you find that Calvert, Four Roses, Frankfort and Barton, and/or any combination of them—Calvert and Four Roses, Calvert and Frankfort, Calvert and Barton, Four Roses and Barton, Four Roses and Frankfort, Frankfort and Barton, or all four of them, and that is what I mean by combination—combined or conspired between themselves, as I have heretofore defined "Combine" and "Conspire" to mean the same thing—

to repeat, if you find that Calvert, Four Roses, Frankfort and Barton, or any combination of them, combined or conspired between themselves to terminate Hawaiian Oke as a distributor, then I instruct you that there was, without more, a violation of the antitrust laws.

While the antitrust law guarantees to any business the right to compete on equal terms with its competitors for so much of the distribution market as it can capture and hold by legitimate business means, it does not guarantee an unchanging status quo, that is, the enjoyment of trade built up over the years. It does, however, prohibit independent businesses from becoming associated together in a common plan which they know is bound to reduce another businessman's opportunity to compete in the same market.

Under the same antitrust law, McKesson and Robbins as a distributor had no legal duty to refrain from legitimately competing with Hawaiian Oke, or any other liquor distributor in Hawaii or elsewhere, including solicitation from Calvert, Four Roses, Frankfort or Barton of the distributorship of any or all of their products.

However, if McKesson and Robbins by solicitation of lines, or otherwise, formed a combination or conspiracy with two or more of those sellers to terminate Hawaiian Oke as their respective distributor and to establish Portside as a distributor, then the conduct of McKesson and Robbins, as well as such conspiring sellers, would be a violation of the antitrust laws.

If you find that defendant Joseph E. Seagram and Sons, Inc., the parent corporation, induced

or persuaded any of the parties to initiate or join a combination or conspiracy to terminate Hawaiian Oke as a distributor and establish Portside as a distributor, then the conduct of Joseph E. Seagram and Sons, Inc. would be a violation of the antitrust laws.

If you find that there was in fact any such combination or conspiracy among some or all of the parties defendant, then the business reasons of any such combining or conspiring parties are not material. Nor would it be a defense that the parties defendant may have believed what they were doing was legal. This is because the law provides that combinations or conspiracies involving refusals to deal cannot be excused even for legitimate business reasons.

To restate it a little differently, acting individually, The House of Seagram, its sales divisions, Calvert, Four Roses and Frankfort, as well as Barton, had every right to select their respective customers and acting individually and not in concert to refuse to sell their goods to any person for reasons deemed sufficient by them. For the purposes of this case, a refusal to deal becomes illegal under the Sherman Act only when it is based upon or arises out of a combination or conspiracy, and then it becomes an unreasonable restraint of trade. The fact that a refusal to deal with plaintiff by any of the sellers acting individually may have resulted in an adverse effect on plaintiff's business, does not make a refusal to deal, under such circumstances, a violation of the antitrust laws.

I want you to understand, though, that the business reasons of each and every one of the

> parties may be considered by you in determining whether there was in fact a combination or conspiracy between them, as the plaintiff contends, or whether the parties in fact acted independently, as the defendants contend.
>
> So, if you find that the divisions of The House of Seagram and Barton,—The House of Seagram, Frankfort, Calvert, Four Roses—acted independently for their own business interests and not pursuant to any combination or conspiracy among themselves, or with McKesson and Robbins, to give their several liquor lines to Portside, then there would be no violation of the antitrust laws and you must find in favor of all the defendants.

This instruction is composed mainly of the court's Instruction No. 6, but also contains portions of the court's Instruction No. 5 and the court's revision of Seagram's proposed Instruction No. 7 (R. 252). Defendants objected to Instruction No. 6 (Tr. VIII: 3140-3151) on the ground that, combined with the court's instruction on participation in a common plan (Tr. VIII: 3203, 3212), it permitted the jury to find a per se violation from the mere fact that McKesson solicited Seagram's and Barton's business and that each one knew about the solicitation of the other. Defendants pointed out that if the non-dealing with plaintiff was simply a byproduct of the plan to establish Portside and if Seagram and Barton participated in that plan solely to improve their respective distribution systems, this was not a per se violation of the Sherman Act.

Defendants objected to the court's revision of Seagram's proposed Instruction No. 7 on the same grounds. (Tr. VIII: 3075-3089.)

ERROR NO. 6

The court erred in charging the jury in court's Instruction No. 2 that the unincorporated divisions of Seagram were legally capable of conspiring among themselves. This was repeated in court's Instruction No. 6 (set out in full in Error No. 5, *supra*). The jury was further charged that a verdict against any of the Seagram divisions was to be returned against The House of Seagram, Inc. (Tr. VIII: 3204-3296):

> We have an unusual situation in this case, however. Within The House of Seagram, Inc., are three sales divisions concerning which you have heard much evidence. These sales divisions are Calvert Distillers Company, Four Roses Distillers Company, and Frankfort Distillers Company. In each case it is C-o, period.
>
> You are instructed as a matter of law that, even though these are but three of the several divisions of The House of Seagram, Inc., nevertheless, they are entities or units which, under the antitrust laws, are legally capable of conspiring among themselves as well as with the other named defendants outside The House of Seagram, Inc. For the purpose of clarity, therefore, whenever in these instructions I use the word "parties," that word not only includes Joseph E. Seagram and Sons, Inc., McKesson and Barton, but also each of The House of Sea-

gram's three sales entities, Calvert, Four Roses and Frankfort. . . .

Each of these divisions of defendant House of Seagram, Inc., shall be treated by you as separate entities for the purpose of determining whether or not there has been a combination or conspiracy, . . . to terminate Hawaiian Oke as their respective distributor. For the purpose of returning a verdict, however, you will consider these divisions as being the defendant, The House of Seagram, Inc.

. . . if you should find, . . . that there has been a conspiracy among two of those three entities, for example, and no one else, you could return a verdict, but since they are within the parent corporation you would have to return it against The House of Seagram, Inc.

. . . .

Touching again on this, if you should find that any two or more of these three sales entities did enter into a conspiracy, as I have defined that term to you, to terminate Hawaiian Oke's distributorships, then any conspiracy which you might find one or more of these sales entities entered into would be chargeable for the purposes of assessing damages, if any are found, against The House of Seagram, Inc.

Defendant Seagram objected (Tr. VIII: 3163):

Mr. Anthony: We note our objection to the giving of court's Instruction No. 2 . . . on the grounds . . . that it stands for the proposition that a corporation may conspire with itself, which as I read it is not the law.

. . . .

The Court: The Court will give over objection the Court's Instruction No. 2 as modified.

Seagram also objected to Instruction No. 6 relating to the intracorporate conspiracy question (Tr. VIII: 3139-3140):

> The Court: Court's Instruction No. 6.
> Mr. Anthony: . . . I object to the unincorporated divisions (part) of the instruction.
>
> . . . .
>
> Mr. Anthony: . . . (N)or can there be any verdict against The House of Seagram alone. There has got to be three of these defendants, all three, in any money verdict in this case. I mean The House of Seagram, Barton, Barton Western and McKesson.

Further grounds of objection were urged below (Tr. VII: 2745-2757) to the ruling on unincorporated divisions conspiring among themselves, were overruled (Tr. VII: 2762-2777) and defendants objected (Tr. VII: 2777-2782).

Objection was also taken to the form of verdict which permitted the jury to return a verdict against The House of Seagram, Inc. alone. (Tr. VIII: 3228.)

ERROR NO. 7

The court erred in charging the jury in court's Instruction No. 6 that Joseph E. Seagram, Inc. (parent of The House of Seagram, Inc.) could not lawfully direct the unincorporated divisions of The House of

Seagram, Inc. to change distributors. This is set forth in Error No. 5, *supra*. Objection was as follows (Tr. VIII: 3139-3140):

> The Court: Court's Instruction No. 6.
>
> Mr. Anthony: The second paragraph on page 2 ought to come out. That is just confusing in this case. There is no evidence of Joseph E. Seagram in that, and what Mr. Blecher ought to do is dismiss without prejudice and he can do that without the slightest harm to his case now or on appeal or on a retrial or at any time, because this is just going to make more and more confusion. . . .
>
> . . . .
>
> Mr. Anthony: . . . (T)here can be no verdict against Joseph E., nor can there be any verdict against the House of Seagram alone. . . .

Instruction No. 2 allowed a finding of conspiracy between the parent corporation and its divisions (Tr. VIII: 3163):

> Mr. Anthony: We note our objections to the court's Instruction No. 2 first on the grounds that it erroneously includes Joseph E. Seagram . . .

Objection was also taken to the alternate form of verdict that would have permitted the jury to find a conspiracy among the Seagram corporations and divisions alone (Tr. VIII: 3228):

> Mr. Anthony: I object to the giving of Alternate No. 4, in which the court would permit the jury to return a verdict against Joseph E. Seagram and Sons, Inc., and the House of Seagram.

ERROR NO. 8

The court erred in giving the following instruction on parallel behavior (Tr. VIII: 3202):

> Mere similarity of conduct among various persons, and the fact that they have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.
>
> To repeat that a little differently, while parallel behavior is admissible circumstantial evidence from which you may infer agreement, nevertheless proof of parallel behavior does not of itself necessarily establish an agreement.

It also erred in refusing the following Barton's Instruction No. 9:

> The fact alone that two or more defendants dealt with plaintiff in a substantially similar manner (at or about the same time) does not support an inference of conspiracy even though each defendant may have known that the business behavior of the other was similar to its own. Similarity of operation does not prove a conspiracy unless there are circumstances which logically suggest joint agreement as distinguished from individual action. (R. 222.)

The grounds of objection to giving the court's modification of proposed Instruction B-9 and to refusing to give proposed Instructions B-9, S-5 or S-11 as submitted are set forth at Tr. VIII: 2994-3011. Defendants urged that their proposed instructions correctly

stated the law and that the court's charge which permitted the jury to infer conspiracy from mere parallel conduct alone was erroneous.

The court also erred in refusing Seagram's Instructions Nos. 5 and 11, which read as follows:

> You are instructed that each of the defendants had every right to select the distributor in Hawaii of its products and the right to change distributorships in accordance with the terms of the contract with plaintiff. If you find that the defendant Seagram did not renew its distributorships with plaintiff in accordance with the terms of its contract for business reasons satisfactory to it and not as a result of any combination or conspiracy with the other defendants, such action is perfectly lawful even though others followed a similar course. (S-5, R. 231.)
>
> The crucial question is whether defendants' conduct toward plaintiff stems from independent decision or from an agreement, tacit or express. To be sure business behavior is admissible circumstantial evidence from which the fact finder may infer agreement by persons of parallel business behavior, but this does not conclusively establish agreement or constitute a Sherman Act offense. (S-11, R. 357.)

ERROR NO. 9

The court erred in admitting Exhibits P-2, P-3, P-4 and P-5 and in permitting them to be explained by the witness while at the same time refusing to permit cross-examination of the witness on their relevance.

1. The Evidence and the Objections

Plaintiff called a CPA as a witness (Tr. III: 1072-1073):

> Mr. Blecher: . . . (T)his witness . . . will not in any sense be giving us 'expert testimony'. . . .
>
> The Court: Is my understanding correct, that he is offered as an expert in computation?
>
> Mr. Blecher: That is correct.

Caldwell testified that he had no familiarity with the liquor industry (Tr. III: 1073) but was told by Mr. Blecher that there were no extraneous factors that would affect the charts (Tr. III: 1093-1094). The exhibit was received over objection that it was speculative, without foundation and irrelevant. (Tr. III: 1095, 1104.)

Exhibit P-3, a chart representing plaintiff's projected profits for the years 1965-1969, was received over objection that it was speculative. (Tr. III: 1109.)

After Caldwell admitted he had not taken into account the actual 1966 experience in the liquor industry in Hawaii, the objections were renewed. (Tr. III: 1121.)

Defendants pointed out instances in which the assumptions in the charts contradicted admitted facts. (Tr. III: 1121-1125.) These objections were overruled. (Tr. III: 1129.)

Exhibit P-4, a profit projection for plaintiff based on the earnings of McKesson, was received over objection that no basis of comparison was shown. (Tr. III: 1130, 1136.)

Caldwell admitted he had made no analysis of the operations of McKesson as compared with those of Hawaiian Oke. (Tr. III: 1139.) The following occurred (Tr. III: 1139-1141):

> Q. Do you think that it is good accounting principle to apply the profit of one wholesaler to the sales of another wholesaler to determine the profit of the second wholesaler without making such a comparison?
>
> Mr. Blecher: I object to this question on the ground that it calls for an opinion and conclusion. There is nothing in this exhibit to indicate that the witness . . . did other than what I asked him to do. . . .
>
> . . . .
>
> Mr. Blecher: . . . the witness has made it clear that he has done nothing but a mathematical computation of certain things which I developed as a matter of legal theory. . . . And for them to inquire about sound accounting principles outside the area about which he testified, they are trying to cross-examine as though he is vouching for these that he is an expert.
>
> . . . .
>
> Mr. Anderson: . . . Furthermore, Mr. Blecher said that this man is not an expert. From what Mr. Blecher is saying, as I understand, this is merely a dummy Mr. Blecher. I don't like the word, but basically that is what it is. He says it is his evidence.
>
> Mr. Blecher: That is basically correct.
>
> Mr. Anderson: Then it is Mr. Blecher's argument to the jury, but it is not evidence unless this man is an expert.

At first the court refused to admit Exhibit P-4 (Tr. III: 1145), but later reversed his ruling. (Tr. VII: 2679.)

Plaintiff offered Exhibit P-5, a chart applying earnings multiples to the average projected profit. The court reserved decision, and a further objection was raised (Tr. III: 1147):

> Mr. Anthony: There is one other item. I believe to have a price earnings ratio you should have an expert in that field to give his opinion on this, rather than Mr. Blecher telling the witness on the stand to make out a memorandum. This is an additional ground to the objection.

Caldwell admitted that he simply followed Mr. Blecher's instructions in preparing Exhibits 2, 3, 4 and 5. The following then occurred (Tr. III: 1152):

> Q. . . . Would you have wished to investigate audit statements if you were investigating this company for the prospective purchaser?
>
> Mr. Blecher: I object to the question as exceeding the scope of direct examination.

The objection was sustained.

. . . .

> Q. In order to come to a conclusion concerning the value of a corporation, isn't it good accounting principle to examine the books and records of a corporation in order to be of some assistance to a purchaser who respects your advice as an accountant?
>
> Mr. Blecher: I object to the question on the grounds that the witness has not been established . . . as an expert in this area.

> The Court: That is in the area of——
>
> Mr. Blecher: Of corporate acquisitions, mergers, other than as an expert accountant. And this was the testimony and there was no testimony on direct or cross-examination with very minor exceptions.

The objection was sustained. (Tr. III: 1155.)

Defendants attempted to cross-examine the witness as to factors not considered by him in preparing the charts. (Tr. III: 1189-1190.) This was objected to and sustained.

Defendants renewed their objections to Exhibits P-4 and P-5 and moved to strike Exhibits P-2 and P-3. (Tr. VII: 2675-2678.)

The court admitted Exhibits 4 and 5 and denied the motions to strike Exhibits 2 and 3. (Tr. VII: 2679.)

2. Grounds of Error

a. The projections were not evidence, but merely arguments of counsel presented through a dummy witness.

b. Caldwell was not qualified as an expert.

c. The exhibits were irrelevant to the issue, which was the market value of plaintiff's business.

d. The exhibits were speculative and based on assumptions not warranted by the evidence.

e. Several assumptions in the exhibits were unexplained.

f. No foundation was laid to establish the comparability of McKesson and plaintiff.

ERROR NO. 10

The court erred in admitting testimony of abstract expressions of interest by third parties in acquiring plaintiff's business.

1. The Evidence and the Objections

On direct examination Ted Wong related conversations he had had with third persons regarding the prospective sale of the corporation. Defendants objected as hearsay and irrelevant. (Tr. I: 207-209.)

Wong was permitted to testify to conversations he had had with individuals in which they had expressed interest in purchasing Hawaiian Oke or a portion of the company's stock. (Tr. I: 211-218.) In no case was there an offer to buy, and in no cases was there any mention of price.

In the course of Wong's testimony, plaintiff offered Exhibit P-54, a letter from one George Thornally to one C. T. Wong of the Liberty Bank in Honolulu, expressing Thornally's interest in plaintiff and requesting Wong to advise him if the company were for sale. Objection was made to the introduction of the letter and any testimony concerning it (Tr. I: 212-214):

> Mr. Anthony: May I add a ground that this has no relevance to this lawsuit at all?

The Court: The objection is overruled.

Mr. Blecher: We offer Exhibit 54 into evidence, your Honor.

The Court: The same objection?

Mr. Anthony: Yes, your Honor.

The Court: By all counsel? The objection is overruled.

. . . .

2. Grounds of Error

a. The evidence was irrelevant.

b. The evidence was hearsay.

ERROR NO. 11

The court erred in admitting evidence of alleged out-of-pocket losses.

Exhibit P-6 lists plaintiff's annual profits and losses from 1959 through 1966. It was admitted over objection that no foundation was laid and was speculative and was presented as an argument of counsel through a CPA as his dummy and was not expert testimony. (Tr. III: 1149-1150.)

ERROR NO. 12

The court erred in instructing the jury that it could consider the question of plaintiff's possible future profits and in refusing to instruct that plaintiff was making no claim for such profits. The court instructed as follows (Tr. VIII: 3216-3217):

> As I said, if, and only if, but if you find that the plaintiff is entitled to some damages, then I instruct you that it is proper, under the antitrust laws, for the plaintiff to recover the difference, if any, between the value of its business at the time of the injury, and the amount of money and property which the stockholders actually received as a result of the liquidation which, plaintiff asserts, was forced upon it by the termination of Calvert, Four Roses, Frankfort and Barton. In considering the amount of this difference, if any, in this respect you should also look to all of the facts and circumstances in the record on this subject, including all of the testimony and exhibits. You may consider the past profits or losses of the plaintiff, the evidence which bears on the question of future profits or losses; you may consider the trend of the plaintiff's business, whether it was improving or deteriorating; you may consider all of the evidence relating to the interest of third persons in purchasing the plaintiff's business and, in fact, as to whether there was a market for the plaintiff's business at all.

Defendants had offered Instruction M-C, which the court refused (Tr. VIII: 3122-3123):

> You are instructed that although plaintiff in this case claims damage to itself as the result of the alleged conspiracy, plaintiff is not claiming as a measure of damages the difference between any profit it may have made before and after the alleged conspiracy. (R. 362.)

Defendants objected to any instruction which would have permitted the jury to award a verdict based on

lost profits or which did not clearly inform the jury that no such claim was being made. (Tr. V: 2822, 2854; VIII: 2963, 3227.)

ERROR NO. 13

The court erred in instructing the jury that they could take into account the expressions of interest of third persons in acquiring plaintiff's business for the purposes of arriving at the amount of damages. The instruction appears at Tr. VIII: 3216-3217 and is set forth in full in Error No. 12 *(supra).*

Objection was made at Tr. VIII: 2963-2964. Defendants had previously objected that such evidence was irrelevant to any issue in the case. (See Error No. 10, *supra).*

ERROR NO 14

The court erred in instructing the jury that they could take into account plaintiff's alleged out-of-pocket losses in arriving at the amount of damages. The jury was instructed (Tr. VIII: 3217):

> Moreover, plaintiff may also recover, under the law, for out-of-pocket operating losses occasioned as a result of any of defendant's conduct. This, you may consider the out-of-pocket losses alleged by plaintiff to have been occasioned in 1965 and 1966 as a result of the liquidation of its business.

Defendants objected that there was no proof of any out-of-pocket losses caused by any act of defendants

and that the amounts appearing in Exhibit P-6 were without foundation. (Tr. VIII: 2934-2935; 2960.)

ERROR NO. 15

The court erred in instructing the jury that it could treat the Caldwell testimony and exhibits as though it were expert testimony and in refusing to instruct the jury that his exhibits were simply representations of counsel's arguments.

The court instructed the jury as follows (Tr. VIII: 3192-3194):

> The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.
>
> For example, there was reference by Counsel, as you remember, to Vasquez, who was presented as an expert economic analyst in the field of the liquor industry. Also, you had another expert of a different nature, Mr. Caldwell, who is a C.P.A., an expert in accounting. There may have been others, maybe someone who is an expert in advertising. I won't say there was but it may be that you recall some other expert who testified.
>
> But you should consider each expert opinion received in evidence in this case, and give it such

> weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely. Or you may accept it if you think it is sound.
>
> The testimony of an accountant,—and I think we had two or three accountants here—and any charts or graphs prepared by him and admitted in evidence, were received for the purpose of explanation of the facts disclosed by the books and records and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them.
>
> In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that, you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

The court, however, refused to give Barton's proposed Instruction No. 51 (Tr. VIII: 3031-3032):

> Mr. Grant Caldwell, the certified public accountant from Salt Lake City, Utah, was presented by plaintiff, Hawaiian Oke, simply to make certain schedules, charts and graphs as an accountant pursuant to instructions from Mr. Blecher, plaintiff's attorney, using certain financial statements of Hawaiian Oke and certain as-

> sumptions of fact given him by Mr. Blecher. Mr. Caldwell did not claim to be an expert in the liquor industry or any phase of the liquor business and was not presented as such an expert witness by plaintiff.
>
> On the other hand, Dean Stephen Vasquez was presented by defendant, McKesson & Robbins, as an expert in the liquor industry and testified as such an expert witness. (R. 359.)

Defendants urged that an instruction such as B-51 was necessary to clarify for the jury the fact that Caldwell was presented as the alter ego of plaintiff's counsel and was not to be considered in the same light as an expert. (Tr. VIII: 3032.)

ERROR NO. 16

The court erred in refusing to instruct the jury to disregard the rental income from the leasehold that had been transferred out of the corporation. One instruction offered was Barton's proposed Instruction No. 50:

> The evidence is clear that the Bishop Estate leasehold was transferred by Hawaiian Oke to Mrs. Thelma Wong in June 1963 to hold as trustee for the stockholders of Hawaiian Oke and she has been managing it and collecting the rentals from it for them. Therefore, even if you should find that there was a conspiracy among the defendants or certain of them as alleged by plaintiff, in determining what damages, if any, was suffered by plaintiff as a proximate result

> of such conspiracy, you may not include the value of such leasehold or any rentals past or future produced from the leasehold since nothing the defendants did deprived the plaintiff of the leasehold or any of the rentals from it. (R. 358.)

Another instruction offered on this point was McKesson's proposed Instruction No. 11:

> The evidence in this case establishes that in June, 1963, the plaintiff corporation assigned to Thelma Wong as trustee for stockholders of Hawaiian Oke and Liquors, Ltd. the Bishop Estate leasehold on the premises at which plaintiff conducted its business, and that the plaintiff corporation was never thereafter the owner of that lease. Accordingly, all retail income derived after June, 1963 from subleases of the business premises of plaintiff corporation was income to Thelma Wong as Trustee for stockholders and was not income to the plaintiff corporation.
>
> If you should find that a conspiracy existed in this case in violation of Section 1 of the Sherman Act, and only in that event you will be obliged to determine what damages are due to plaintiff. If you therefore reach the damage issue of this case, you are instructed that you may not consider any rental income derived from subleases at the plaintiff's business premises after June, 1963 as income to the plaintiff corporation. (R. 361.)

Defendants urged that since the evidence was uncontradicted that the leasehold had been transferred from plaintiff to Thelma Wong, the income there-

from after the transfer was not properly includable in determining the fair market value of plaintiff corporation in 1965. (Tr. VIII: 3026-3031, 3113-3114.) Both instructions were refused. (Tr. VIII: 3031, 3114.)

ERROR NO. 17

The court erred in refusing to instruct the jury that a business is not necessarily worth more while operating than after it has shut down. The instruction refused was Barton's proposed Instruction 52:

> You are not to assume that a business must be worth more while it is operating than it is after it stops operating. This may or may not be true. (R. 360.)

The instruction was offered to modify plaintiff's Instruction 37, the substance of which was given by the court (see Error No. 14, *supra*). That instruction listed the factors which the jury could consider in arriving at the amount of damages. The instruction was offered (Tr. VIII: 3033-3034) and refused (Tr. VIII: 3035).